87-1227

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

RALPH KEMP, WARDEN,
Petitioner,

v.

HORACE WILLIAM DIX,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1.

Whether, in a case where a defendant pleads insanity and the talismanic language of *Francis v. Franklin,* — U.S. —, 105 S.Ct. 1965 (1985), is charged, the harmless error rule of *Rose v. Clark,* 478 U.S. —, 106 S.Ct. 3101 (1986), is inapplicable as a matter of law?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on October 22, 1987. (Appendix E).

The initial opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, granting Respondent federal habeas corpus relief was entered on March 20, 1984. (Appendix A). There was an amendment to the district court's order dated June 21, 1984. (Appendix B). A panel of the Eleventh Circuit affirmed the district court order in part and reversed the district court order in part in *Dix v. Kemp,* 763 F.2d 1207 (11th Cir. 1985). (Appendix C). The corrected opinion

of the Eleventh Circuit was issued in connection with this matter on October 28, 1986. *Dix v. Kemp,* 804 F.2d 618 (11th Cir. 1986). (Appendix D). On January 26, 1987, the Eleventh Circuit Court granted Petitioner's petition for rehearing and suggestion for rehearing *en banc.* (Appendix E). On October 22, 1987, the Eleventh Circuit, sitting *en banc* affirmed the granting of federal habeas corpus relief on a different basis than that found by the district court. (Appendix E).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on October 22, 1987. No suggestion for rehearing *en banc* was filed on the behalf of the Petitioner. A stay of the mandate was granted by the Eleventh Circuit in this matter on November 23, 1987.

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 16-3-2 Mental capacity; Insanity.

A person shall not be found guilty of a crime if, at the time of the act, omission or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission or negligence.

O.C.G.A. § 16-3-28 Affirmative Defenses.

A defense based upon any of the provisions of this article is an affirmative defense.

STATEMENT OF THE CASE

Respondent, Horace William Dix, was convicted in the Superior Court of Clayton County on March 21, 1975, for the murder of his former wife and the kidnapping of three family members. Respondent Dix was given the death penalty for his murder conviction. Respondent Dix appealed to the Supreme Court of Georgia which affirmed his convictions and sentences in *Dix v. State*, 239 Ga. 209, 232 S.E.2d 47 (1977). Next, Respondent filed a petition for writ of habeas corpus in the Superior Court of Clayton County, Georgia, which petition was dismissed on December 29, 1977.

In May of 1978, Respondent filed a petition for writ of habeas corpus in the Superior Court of Tattnall County. Following a hearing held in the Superior Court of Tattnall County on August 8, 1978, Respondent was denied

state habeas corpus relief on November 28, 1978. Repondent's application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on February 14, 1978.

Respondent filed an extraordinary motion for a new trial in the Superior Court of Clayton County on March 12, 1979. The extraordinary motion for new trial was denied on March 21, 1979. The Supreme Court of Georgia affirmed the denial of the extraordinary motion for new trial in *Dix v. State,* 244 Ga. 464, 260 S.E.2d 863 (1979). Respondent's petition for a writ of certiorari filed in this Court was denied on March 24, 1980.

Respondent filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia, Atlanta Division, on May 14, 1980. A motion for an evidentiary hearing was denied on April 5, 1983, and on August 17, 1983, the United States Magistrate entered a report and recommendation recommending that the writ of habeas corpus issue on only one ground, i.e., the allegation that Respondent was incompetent to stand trial. Both parties filed objections to this report and recommendation.

On March 20, 1984, the district court entered an order finding that the trial court's instructions concerning sentencing were insufficient to channel the jury's discretion as required by *Gregg v. Georgia,* 428 U.S. 153, 164 (1976). Therefore, the district court granted federal habeas corpus relief as it pertained to the imposition of the death sentence and remanded Respondent's case to the Superior Court of Clayton County for resentencing. Petitioner filed a notice of appeal to the Eleventh Circuit Court of

Appeals seeking review of this portion of the district court's order and Respondent cross-appealed.

Following oral argument, the Eleventh Circuit issued an opinion dated June 5, 1985, finding that the trial court's instructions concerning mitigating circumstances "left the jury without proper guidance in its sentencing deliberations." (Appendix B). The panel opinion of the Eleventh Circuit dated June 5, 1985, held that the trial court's charge was impermissibly burdenshifting under *Sandstrom v. Montana,* 442 U.S. 510 (1979), and that the circumstances of this case did not require the application of the harmless error rule "since the evidence of insanity in this case was not overwhelming." *Dix v. Kemp,* 763 F.2d 1207 (11th Cir. 1985).

Petitioner petitioned for rehearing *en banc* seeking a review of that panel decision. Supplemental briefs were filed in the Eleventh Circuit on behalf of both parties. Following the submission of the supplemental briefs by the parties, the panel issued an opinion on October 28, 1986, withdrawing its earlier published opinion and filing a substitute opinion of the Court. *Dix v. Kemp,* 804 F.2d 618 (11th Cir. 1986). (Appendix C). On January 26, 1987, the Eleventh Circuit granted rehearing *en banc* and directed that oral argument be granted. (Appendix D). On October 22, 1987, the Eleventh Circuit granted federal habeas corpus relief to Respondent, finding there to be a burden-shifting charge on intent which was not harmless error under *Rose v. Clark,* 478 U.S. —, 106 S.Ct. 3101 (1986).

STATEMENT OF THE FACTS

At approximately 11:00 a.m., Dixie Jordan (Respondent's ex-wife) and her mother returned to Ms. Jordan's apartment. The Respondent, Horace Dix, was waiting in the driveway beside his car. (T. 158). Mrs. McPherson asked her daughter whether or not she should stay. Ms. Jordan told her mother that it would be better if she spoke with the Respondent alone. (T. 158). Mrs. McPherson left Ms. Jordan and the Respondent at Ms. Jordan's apartment and went to visit Mrs. McPherson's other daughter, Barbara. (T. 159). Shortly thereafter, Ms. Jordan called her mother at Barbara's apartment and told her to come to her apartment for dinner at approximately 4:00 p.m. because the Respondent wanted to talk with Mrs. McPherson. (T. 159).

At approximately 3:00 p.m., Barbara called her sister's apartment. The Respondent answered the phone and stated that Ms. Jordan had stepped out to visit a neighbor. (T. 158-160, 228, 244). Barbara left word for her sister to return the call. When the call was not returned, Barbara called her sister's apartment once again, but the Respondent did not reply to an inquiry as to Dixie Jordan's whereabouts, but instead requested that Dixie's mother come over to the apartment. (T. 161, 228-229, 245). Mrs. McPherson, Barbara and Barbara's fourteen year old daughter, Rita, drove over to Dixie Jordan's apartment.

Upon their arrival at Ms. Jordan's apartment, the Respondent opened the door. The Respondent was wearing a brown shirt and brown striped trousers. (T. 245). When Mrs. McPherson had seen the Respondent in Dixie's

driveway earlier, the Respondent had been dressed in a blue work shirt and faded blue pants.

Respondent told the women that Ms. Jordan was lying in the bedroom resting. Mrs. McPherson approached the bedroom door and tried to turn the knob, but the door was locked. Mrs. McPherson called for her daughter, but there was no answer. (T. 162, 229, 246). Respondent told Mrs. McPherson, "Don't open that door." (T. 162, 229, 246). The Respondent also stated that "you are not messing my plans up." (T. 246).

Respondent drew a gun and held fourteen year old Rita in front of him. (T. 162). Mrs. McPherson told Barbara not to scream. (T. 246). Barbara asked the Respondent to allow Rita to sit down but the Respondent replied, "You ain't going to sit her down." (T. 230). Mrs. McPherson asked the Respondent why he was holding them at gunpoint and he replied that they were all going to Carrollton, Georgia.

When asked by Mrs. McPherson whether Barbara and Rita could stay in the apartment, the Respondent replied that they could not because if they did, they would call the police. The Respondent refused to allow Barbara to stay. (T. 163, 247). Respondent stated, "You all are not going anywhere; you all are not messing up my plans; you all are going to Carrollton." (T. 247). Mrs. McPherson was allowed to leave a note for Dixie. (T. 164). The Respondent concealed his revolver and escorted the three women to Dixie's car. (T. 165, 166).

While driving, the Respondent stated that Dixie would never be mistreated anymore by anyone and that she was too good to be mistreated by anyone. (T. 166). Respon-

dent told Mrs. McPherson not to try anything and not to try to get out of the car. (T. 166). The Respondent spoke of his mother and his aunt and uncle and said that he was "going to take care of them." (T. 166).

At a traffic light, the Respondent told the group that there was a policeman nearby and not to try anything. (T. 167). Later, Respondent stopped at a gas station and again told the group not to try anything and not to try to get the police. (T. 167).

Later, the Respondent parked beside the road and indicated that he was going to stay there until it was dark. When questioned, he said that he intended to shoot his mother, his aunt and his uncle and that he would be seen unless it was dark. The Respondent stated that his reason for intending to kill the three was that his aunt and uncle "had beaten his mama out of a nursing home." (T. 168).

Eventually, Respondent was persuaded to drive to a store to get something for Rita to drink. (T. 168). The Respondent told Mrs. McPherson to get out of the car to buy cokes and cigarettes. (T. 169). Mrs. McPherson had first asked Respondent whether he was going to get out and get the cokes and he stared at her a minute and said, "No you get out and get them." Mrs. McPherson got out of the car and refused to get back in the car even though commanded to do so by the Respondent. The Respondent's gun was pointed at Mrs. McPherson during the conversation.

Mrs. McPherson told Barbara and Rita to get out of the car. At this time, the Respondent put his hands across the back of the seat to block their exit and said they were not getting out of the car. Mrs. McPherson said,

"Horace, just don't start no stuff here." She noticed that Respondent's face was scratched very badly. (T. 169, 170, 231, 232, 248). Once again Mrs. McPherson asked the Respondent whether Dixie was all right and he answered yes. At this time, a car drove up to the store. Mrs. McPherson told the Respondent not to start anything and pulled back the seat to allow Barbara and Rita to exit. They jumped out of the car as fast as they could. The Respondent told Mrs. McPherson to get back into the car and "just ride down the road," but she refused. The Respondent asked Mrs. McPherson how she was going to get back home and she said that she would call her son to come and get her. (T. 171, 172, 232, 248).

Mrs. McPherson went into the store and made several phone calls. (T. 171). During the time that Mrs. McPherson was in the store, the Respondent motioned for Barbara to come to the car. Barbara asked the Respondent if there was anything wrong with Dixie and the Respondent replied, "yes, I hurt her." He then stated, "If this gets out, I'll kill you, Alpha and Rita." (T. 248). While Mrs. McPherson was making phone calls, the Respondent drove off.

Mrs. McPherson called her son to come and pick them up. She called her other daughter, Charlotte, and told her that she was afraid that something terrible had happened to Dixie. Mrs. McPherson told Charlotte to go to Dixie's apartment at once and to attempt to get into Dixie's bedroom. (T. 172, 232).

Pursuant to Mrs. McPherson's call, Charlotte and her husband drove to Dixie's apartment and met Dixie's ex-husband who was bringing two children back from a

weekend visit. (T. 275, 276, 295, 296). The resident manager opened the front door to Dixie's apartment. The lock on the bedroom door was opened using a coat hanger. (T. 276, 297). The body of the victim, Dixie Jordan, was found on the bed, wrapped in a bedsheet. (T. 276, 297). Later, on Mrs. McPherson's return to the apartment, Mrs. McPherson located the blood-stained shirt and pants worn by the Respondent earlier that morning, rolled up tightly and shoved behind the clothes hamper. The clothes had been covered by towels. (T. 176, 177, 405).

Police officers discovered two butcher knives in the kitchen sink. A piece of adhesive tape was found in the bathroom in the commode. A roll of adhesive tape was found on the bed. Pieces of a broken ashtray were found in the garbage sack on top of the dryer in the laundry room. Cigarette packs were found on the bed. (T. 341).

A State Crime Lab expert testified that there was a considerable amount of blood about the blade of one of the knives. (T. 993, 405, 406). The blue shirt and pants belonging to the Respondent were found to contain blood of the same type as that belonging to the victim. (T. 404, 405). There was an indication of blood on one of the pieces of the ceramic ashtray. (T. 416).

Another State Crime expert testified that Respondent's fingerprints were found on the broken ceramic ashtray. (T. 422, 423). No fingerprints were found on the role of adhesive tape. (T. 434).

Another State Crime expert identified the piece of adhesive tape as coming from the roll which was found. A piece of hair was attached to the piece of adhesive tape and it was identified as slightly reddish brown in color

and being a Caucasian head hair. (T. 438-440). The hair of the victim was slightly reddish brown. (T. 984).

Dr. Joseph Burton, a forensic pathologist and medical examiner, testified that Ms. Jordan had been struck about the jaw area of her face with a blunt object. (T. 533). Lines of dried blood found on the face of the victim were consistent with the premise that two stripes of adhesive tape, which had been torn from a roll left lying beside her head, had been pieced together to make a wider strip and then placed over Ms. Jordan's mouth prior to the presence of the blood on Ms. Jordan's face. (T. 532, 533, 528, 529). Ms. Jordan had been strangled by an object placed horizontally around her neck, consistent with the towel left beside her body. The strangulation was so severe that the pressure of the blood in her head rose to the point that it caused her to hemorrhage through the pores of the skin, the whites of the eyes and even the eyelids. (T. 533, 534, 538).

Three superficial cuts, approximately three to four inches in length, had been made upon the throat of Ms. Jordan. The cuts were made in such a manner that they should not have been fatal, but were made so as to sever the large muscles and cause severe bleeding. (T. 534). Seven superficial stab marks were inflicted into Ms. Jordan's chest and abdomen by a sharp instrument being forced through the layers of the skin and then pulled out in a slicing motion. (T. 536, 537, 1014). An "S" shape, approximately six inches in length, was carved into her abdomen. (T. 536).

Dr. Burton testified that all of the wounds including the blow to the face, the strangulation and the cuts to the

throat, chest and abdomen were inflicted while Ms. Jordan was still alive. (T. 539). The cause of death was the three deep stab wounds to the heart. (T. 539).

For a period of one to two weeks, the Respondent evaded efforts by law enforcement officers to capture him, but he was finally arrested in Carroll County, Georgia. (T. 465-467).

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT HAS ELIMINATED AS A MATTER OF LAW THE APPLICABILITY OF THE HARMLESS ERROR RULE IN ALL CASES WHERE A DEFENDANT PLEADS INSANITY.

Acting *en banc,* the Eleventh Circuit in this case undertook a definitive analysis of the effect of the presentation of an insanity defense by a criminal defendant in Georgia on a determination of whether an allegedly burden-shifting charge on intent constituted harmless error. The Circuit Court cavalierly concluded that the *Rose v. Clark,* 478 U.S. —, 106 S.Ct. 3101 (1986) harmless error rule would "rarely" be applicable in a case where a defendant pleads insanity at trial and there is an "incantation" of the talismanic language from *Francis v. Franklin,* — U.S. —, 105 S.Ct. 1965 (1985), contained in the trial court's charge.

Consistent with its reluctant application of the principles of *Rose v. Clark, supra,* in capital cases, the Circuit Court in this case and the companion case of *Ralph Kemp*

v. Charlie Benson Bowen, application no. —, has embarked on a legal course resulting in the elimination of an entire class of cases entitled to a *Rose v. Clark* harmless error review. For all practical purposes, the Circuit Court has removed insanity defense cases as a matter of law from the purview of *Rose v. Clark.*

Contrary to the Circuit Court's holding (Appendix E, p. 15, n. 13), in most situations, an unsuccessful insanity defense precludes any consideration of whether the acts were intentional by virtue of the nature of the defense itself. It is only in "rare situations" when an insanity defense will *not* include an admission that the acts committed were intentional. In this case and in the *Kemp v. Bowen* case, the Respondents' insanity defenses included an admission that the acts resulting in the homicide were intentionally committed. The Circuit Court never reviewed the facts of this case to determine if the element of intent was contested by Respondent. Instead, the Circuit Court merely holds as a matter of black letter law that the presentation of an insanity defense ordinarily precludes the application of the harmless error rule of *Rose v. Clark.*

As properly noted by Judge Hill in his dissenting opinion, the presumption in this case was the one reviewed by this Court in *Francis v. Franklin, supra,* i.e., the presumption that the acts of a person of sound mind and discretion are presumed to be the product of the person's will. *Francis v. Franklin,* supra at 1970. Judge Hill properly found that the "sound mind presumption" was inapplicable to this defendant because by rejecting Respondent's insanity defense, the jury found Respondent to be

of sound mind. Finally, Judge Hill noted the implausible result reached by the Circuit Court:

> Until today, though, I know of no holding that the mere incantation of the presumption, directed toward a particular defendant, would spoil a conviction of one to whom it specifically does not apply.

Hill, J. dissenting, p. 2.

Judge Hill correctly related the manner in which the harmless error rule could be properly applied in the context of an insanity defense case by stating:

> Had either of the two defendants [Dix or Bowen] been found not to be of sound mind, that defendant's trial would not be in any sense affected by the presumption of intent. Thus, in the event of the finding of unsound mind, no constitutional error appears. On the other hand, in each case, if the defendant were found to be of sound mind, the instruction condemned in *Sandstrom* and *Franklin* would apply and our task would be to ascertain whether, under *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986), the instruction was harmless error.

Hill, J. dissenting opinion, p. 3.

As Judge Hill's opinion illustrates, there can be no predetermination as a matter of black letter law that a *Rose v. Clark* harmless error analysis is inapplicable to a particular class of cases which is the focus of discussion. Rather, contrary to the obvious predisposition of the Circuit Court, these insanity defense cases must be examined under the totality of the circumstances, on a case by case basis. If such an examination were made in this case, not only would it be shown that Respondent did not contest intent, but also that the state overwhelmingly proved it. Fay, J. dissenting, p. 1-2; Hill, J. dissenting, p. 4.

Without a case by case application of the *Rose v. Clark* harmless error rule, "We are at or near the point where The Great Writ automatically issues any time a trial judge is found to have instructed a jury that intention can be presumed from a person's acts." Hill, J. dissenting opinion, p. 1. (Appendix E).[1]

The elimination by the Circuit Court of the harmless error rule of *Rose v. Clark, supra,* as a matter of law in any case where an insanity defense is offered and an intent charge is given, regardless of the facts of the case, warrants the granting of a writ of certiorari.

---

[1]It is clear that consistent with its reluctance to apply the harmless error rule in capital cases, the Circuit Court would totally disregard the nature of any defense proffered by a defendant in making a harmless error analysis, regardless of whether the asserted defense failed to contest the essential elements of the offense. Thus, the harmless error rule would be effectively eliminated.

CONCLUSION

For all of the above and foregoing reasons, Petitioner submits that this Court should grant a writ of certiorari to review whether or not applicability of the harmless error rule set forth by this Court in *Rose v. Clark, supra,* has been eliminated as a matter of law in all cases where a criminal defendant has presented an insanity defense and an allegedly burden-shifting instruction on intent has been given.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HORACE WILLIAM DIX,	)	
	)	
Petitioner	)	CIVIL ACTION
	)	
vs.	)	FILE NO.
	)	C80-826A
LANSON NEWSOME, Warden,	)	
Georgia State Prison,	)	(Filed March 20,
	)	1984)
Respondent	)	

MEMORANDUM OPINION AND ORDER OF COURT

Petitioner, a state prisoner currently incarcerated at the Georgia State Prison, Reidsville, Georgia, has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks habeas corpus relief from the sentence of death for the offense of murder imposed upon him by the Superior Court of Clayton County, Georgia in March 1975. Petitioner was, at the same trial, convicted on three additional charges of kidnapping.

This habeas petition, which raises fifteen (15) grounds, was initially referred to the Magistrate who conducted an evidentiary hearing and directed the parties to file briefs. On August 17, 1983, the Magistrate issued his Report and Recommendation addressing each ground. The Magistrate recommended that petitioner's habeas corpus petition be denied on all grounds except the first ground—incompetency to stand trial. Both parties have filed objections to the Magistrate's Report and Recommendation. Thus, this matter is now before the court on the Magistrate's Report and Recommendation.

BACKGROUND

On the morning of September 8, 1974, at approximately 11:00 a.m., Dixie Jordan, the murder victim, and her mother, Mrs. Alpha McPherson, arrived at Ms. Jordan's apartment. Horace Dix, the defendant and ex-husband of Dixie Jordan, was waiting in the driveway. Ms. Jordan said that it would be better if she spoke with the defendant alone, so Dixie's mother left them at Dixie's apartment and went to visit another daughter, Barbara. Shortly thereafter, Dixie called her mother and asked her to return to Dixie's apartment for dinner around 4:00 p.m. because Dix wanted to talk to her.

At approximately 3:00 p.m., Barbara called Dixie's apartment. The defendant answered the telephone and told Barbara that Dixie stepped out to visit a neighbor. Barbara asked for Dixie to return her call. Receiving no call, Barbara called Dixie's apartment again. Dix again answered the telephone, and Barbara inquired as to Dixie's whereabouts. The defendant did not answer her question, but instead requested that Dixie's mother come over to the apartment. Dixie's mother (Mrs. McPherson), Barbara, and Rita, Barbara's fourteen year old daughter, then drove over to Dixie's apartment.

When they arrived at Dixie's apartment, the defendant opened the door. He stated that Dixie was in the bedroom resting. Dixie's mother tried to enter the bedroom but the door was locked. Mrs. McPherson then called for Dixie but there was no response. At this time, Dix said, "Don't open that door . . . You are not messing my plans up." He had a gun drawn and was holding Rita in front of him. When Dixie's mother asked Dix why he

was holding them at gunpoint, he replied that they were all going to Carrollton, Georgia. When asked if Barbara and Rita could stay in the apartment, he stated that they could not because if they did they would call the police. Dix then concealed his gun and took Mrs. McPherson, Barbara, and Rita to Dixie's car.

Later, while driving, Rita wanted something to drink. Dix was eventually persuaded to stop at a store. There, Mrs. McPherson was told to get out of the car to buy drinks and cigarettes. Mrs. McPherson got out and then refused to get back into the car even though Dix commanded her to do so at gunpoint. Mrs. McPherson then told Barbara and Rita to get out of the car. When the defendant tried to block their exit, Mrs. McPherson said, "Horace, just don't start no stuff here." At about this time another car pulled into the store, and Barbara and Rita got out of the car. Mrs. McPherson then went inside the store to use the telephone. At that time Barbara asked the defendant if there was anything wrong with Dixie. Dix replied, "Yes, I hurt her." He then stated, "If this gets out, I'll kill you, Alpha, and Rita." Dix then drove off. Mrs. McPherson called another daughter, Charlotte, and told her to go to Dixie's apartment and check the bedroom.

When Dixie's room was entered, her body was found in the bed wrapped in a bed sheet. The testimony of Dr. Joseph Burton, forensic pathologist and medical examiner, indicated that Ms. Jordan had been struck with a blunt object in the area of her jaw, and then strangled. Several cuts were also made in her throat, and several superficial stab marks were made in her chest and abdomen. All of

these blows, cuts and wounds, including strangulation, were inflicted while Ms. Jordan was still alive. Dr. Burton testified that Ms. Jordan died of three stab wounds to the heart.

At the trial, the defendant offered evidence which was intended to support his insanity defense. He contended that he was not mentally responsible at the time of the offense because of residual damage from earlier head injuries and prior mental and emotional problems. The jury found sufficient evidence to convict the defendant, finding him guilty of murder and three counts of kidnapping. After the sentencing hearing, at which the defendant testified, the jury recommended the imposition of the death penalty based upon their conclusion that Dixie Jordan had been subjected to inhuman torture and serious physical abuse prior to her death.

On direct appeal to the Georgia Supreme Court, petitioner's conviction and sentence were affirmed. *Dix v. State,* 238 Ga. 209, 232 S.E.2d 47 (1977). Apparently, no immediate petition for writ of certiorari was filed at that time in the United States Supreme Court.

On June 9, 1977, a habeas corpus petition was filed in behalf of Mr. Dix in the Superior Court of Clayton County, Georgia. By Order dated December 29, 1977, that petition was dismissed. No hearing was held in this state habeas petition. On January 30, 1978, petitioner filed notice of appeal from the dismissal of this first state habeas corpus petition. On February 14, 1978, the Georgia Supreme Court denied petitioner's application for a certificate of probable cause.

On February 15, 1978, petitioner applied for clemency to the Georgia Board of Pardons and Paroles. An order staying petitioner's second scheduled execution was granted on March 21, 1978 by the Georgia Board of Pardons and Paroles pending review of the application. Later, on May 17, 1978, the Georgia Board of Pardons and Paroles denied petitioner's application.

On May 30, 1978, petitioner filed a petition for writ of habeas corpus with a stay of execution application in the Superior Court of Tattnall County, Georgia. A simultaneous petition for writ of habeas corpus was filed at the same time in this court. The stay of execution was granted by the Tattnall County Superior Court, and the federal habeas corpus petition was voluntarily dismissed on May 30, 1978.

Previously, on March 12, 1978, petitioner had filed an extraordinary motion for new trial in the Clayton County Superior Court. A two-day hearing was held on the extraordinary motion on March 19 and 20, 1979. By Order dated March 21, 1979, the extraordinary motion for a new trial was denied. Later, on October 16, 1979, the Georgia Supreme Court affirmed the denial of the extraordinary motion for a new trial. *Dix v. State,* 244 Ga. 464, 260 S.E.2d 863 (1979). Following this adverse decision, Dix petitioned the United States Supreme Court for writ of certiorari. The writ was denied on March 24, 1980. *Dix v. Georgia,* 445 U.S. 946 (1980).

On April 25, 1980, the State of Georgia reset petitioner's execution date for May 15, 1980. The instant petition was filed in this court on May 14, 1980. Accompanying this petition was an application for a stay of

execution. By Order dated May 14, 1980, petitioner's scheduled execution was stayed by the district court. Following the stay order, the parties in this action filed briefs which fully addressed the grounds alleged. On August 4, 1981, the Magistrate issued an order directing that the current petition be stayed pending exhaustion of petitioner's available state remedies with regard to his challenge based upon ineffective assistance of counsel.

Thereafter, on September 3, 1981, petitioner filed a habeas corpus petition in the Superior Court of Butts County, Georgia. In that petition, he raised the same grounds pertaining to ineffective assistance of counsel as are currently raised in this petition. On November 15, 1982, this court was informed of the Georgia Supreme Court's affirmance of the Butts County Superior Court's denial of the additional habeas petition. The Georgia Supreme Court found that for purposes of any federal habeas corpus action, petitioner's claims which he raised in his successive petition, were deemed exhausted. *Dix v. Zant*, 249 Ga. 810, 294 S.E.2d 527 (1982).

On August 17, 1983, the Magistrate issued his Report and Recommendation, and on September 22, 1983, this court heard oral argument on the parties' objections to the Magistrate's Report and Recommendation.

Petitioner raised the following grounds, alleging that: (1) he was incompetent to stand trial; (2) the jury charge on the burden of proof improperly shifted the burden to Dix on an essential element of the crime; (3) the aggravating circumstance on which Dix's sentence is based is unconstitutionally overbroad and vague; (4) the death penalty as applied to Dix is an arbitrary and capricious

infliction; (5) death is an excessive penalty; (6) death is cruel and unusual in light of all the circumstances, including mitigating circumstances; (7) the death penalty was given on the basis of fundamentally unfair proceedings; (8) he had ineffective assistance of counsel; (9) he was deprived of due process in that the jury was not given adequate guidance concerning standards governing their deliberation on Dix's sentence; (10) the failure to transcribe closing argument of the trial was constitutional error; (11) Georgia has an inadequate statutory appellate review procedure; (12) electrocution inflicts unnecessary torture and torment; (13) a denial of funds for use in the state habeas corpus proceeding amounted to a denial of equal protection; (14) Dix was indicted by an unconstitutionally composed grand jury; and (15) Dix was convicted and sentenced by an unconstitutionally composed traverse jury. Each of these grounds was addressed by the Magistrate and will be discussed herein.

In reviewing the allegations of this petition, the court's inquiry is limited. Its role is to examine those aspects of the trial affecting petitioner's federal constitutional rights. *Corn v. Zant*, 708 F.2d 549, 555 (11th Cir. 1983). In order to grant habeas corpus relief, it must be determined that petitioner's trial was fundamentally unfair. *Id.*

I. INCOMPETENCE TO STAND TRIAL

The first ground for habeas relief raised by the petitioner is that he was mentally incompetent to stand trial, and therefore, his subsequent conviction contravenes his constitutional right to due process of law. The Magistrate found that the testimony at the defendant's trial

raised a *bona fide* doubt as to the defendant's competency at the time of trial, and therefore, pursuant to *Pate v. Robinson,* 383 U.S. 375 (1966), the trial judge was obligated to *sua sponte* conduct a separate hearing, held in compliance with state law,[1] to determine whether the defendant was in fact competent. The Magistrate thus recommended that the writ of habeas corpus issue on this ground and that the grant of the writ be stayed for a reasonable time pending a determination of whether a meaningful *nunc pro tunc* competency hearing could be held. If a hearing could not be held, then petitioner would be entitled to a new trial, if competent.

The respondent has filed objections to the Magistrate's findings and recommendations on this ground contending that the trial court did not err in not *sua sponte* ordering a competency hearing under *Pate* because the evidence before the court did not and would not have raised a *bona fide* doubt in the mind of a reasonable trial judge as to petitioner's competency.

It is well settled that it is a violation of an accused's constitutional rights to be tried in a criminal case while he is legally incompetent. *Bishop v. United States,* 350 U.S. 961 (1956). Furthermore, the appropriate test for determining the defendant's competency is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402 (1960).

It appears to be undisputed that a special plea of insanity was filed by petitioner's attorneys prior to trial.

Based on this special plea, Chief Judge Harold R. Banke ordered the petitioner sent to Central State Hospital for tests and evaluation in order to determine: 1) whether the petitioner suffered from any mental disease or defects that would impair him to the extent that he would be unable to assist his counsel in the preparation of his defense; 2) whether at the time the alleged offenses were committed, petitioner knew the difference between right and wrong; and 3) whether the defendant is suffering from any mental disease or defect which might influence his actions or mitigate the circumstances of the offense. By letter dated February 17, 1975, Dr. Bosch, Superintendent of Central State Hospital, informed Judge Banke that the tests, examination and evaluation of petitioner had been completed and that they felt that petitioner was legally sane and mentally competent to stand trial. Apparently, based on this examination and evaluation, petitioner's attorneys then withdrew the special plea of insanity prior to the trial.

The court notes that Judge Banke took reasonable measures in an attempt to insure that the defendant was mentally competent to stand trial, however, the issue before this court is whether there has been a *Pate* procedural violation which denied defendant a fair trial.

In *Pate v. Robinson, supra,* the Supreme Court held that where the evidence presented to the trial court raises a *bona fide* doubt as to the defendant's competency to stand trial, the court's failure to *sua sponte* conduct a separate hearing to make further inquiry into defendant's competency denies him his constitutional right to a fair trial. 383 U.S. at 385. Thus, the question before this court is whether the trial judge had before him testi-

monial evidence of any other information which, objectively considered, "should reasonably have raised a doubt about defendant's competency and alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos v. Capps,* 625 F.2d 1258, 1261 (5th Cir. 1980). The Supreme Court has not articulated a general standard for the nature or quantum of evidence necessary to trigger a separate competency hearing, however, the court focused on three factors which should be considered: 1) the existence of a history of irrational behavior; 2) defendant's demeanor at trial; and 3) a prior medical opinion. *Drope v. Missouri,* 420 U.S. 162, 180 (1975); *Lokos v. Capps, supra,* at 1261; *Chenault v. Stynchcombe,* 546 F.2d 1191, 1192-3 (5th Cir. 1977).

The first important factor the court will address is the existence of a history of irrational behavior on the part on the petitioner. In the instant case, the Magistrate first made reference to certain testimony given by laywitnesses, which evidence the Magistrate believed could reasonably have served as a basis for inquiry by the trial court as to whether Dix was competent at that time, although the Magistrate did not contend that the laywitness testimony was in and of itself sufficient to raise a *bona fide* doubt. Apparently, the Magistrate determined that the respective testimony tended to establish some history of irrational behavior.

Upon examination of the testimony of these laywitnesses, the court believes that the Magistrate has intertwined the evidence which would support Dix's defense of insanity at the time of the commission of the crime

with the evidence which would tend to establish a history of irrational behavior.

For example, on page 10 of the Report and recommendation, the Magistrate stated that the testimony of several laywitnesses indicated that Dix was disoriented, exhibited bizarre behavior, was unstable, and suffered a severe personality change after a head injury in the Navy (Trial Transcript 206, 251, 260, 261, 578, 581, 670, hereinafter T.Tr.), and that these allegations could reasonably have served as a basis for inquiry into Dix's competency at the time of trial. However, with the exception of the testimony that petitioner suffered a personality change, testimony with respect to his disorientation, bizzaire behavior, and instability referred solely to the circumstances surrounding the crime, which evidence would go to his defense of insanity at the time of the commission of the crime. This evidence did not tend to establish a history of irrational behavior.

The court now turns to the testimony with respect to petitioner's personality change. Petitioner's mother testified that Dix's personality changed after he came back from the Navy such that he "just had a split personality" (T.Tr. 580-581), and that he would "say ugly things to me" and hold his head "one sided like kinda like that, you know" (T.Tr. 578). There was also the testimony of Ms. Dorothy Polk that petitioner was "distant" after he came back from the Navy and that he would act "real sweet to his mother and daddy and then again he would just be real ugly" (T.Tr. 670). This court concludes that this evidence, standing alone, does not tend to establish a history of irrational behavior and is insufficient to reasonably raise a *bona fide* doubt as to Dix's

competency at the time of trial. *Cf. Pate v. Robinson, supra; Drope v. Missouri, supra; Lokos v. Capps, supra.*

The second factor the court must consider in determining whether the judge should have *sua sponte* ordered a separate compentency hearing is the petitioner's demeanor at trial. With respect to this factor, there is absolutely no evidence in the record to indicate that Dix's demeanor at trial created any suspicion of mental incompetency.

Moreover, the court notes the comments of petitioner's trial counsel in the "Memorandum to be Attached to the Report of the Trial Judge," which document is attached to the respondent's objections to the Magistrate's Report and Recommendation. Of particular significance are the following comments:

> *The defendant was able to discuss his defense before and during the course of the trial,* but his reaction to the import of the evidence being presented against him was so flat that he had to be prodded into giving any effective assistance. After Doctor Sapp diagnosed his mental condition, he prescribed medication for the defendant to help overcome the lapses and other adverse affects of his injury-related mental disorder. While this medication did not interfere with presenting his defense to the issues involved, the symptoms of the disease itself presented a frustrating challenge. This was made increasingly difficult in view of the invocation of the rule as to the sequestration of witnesses. His mother and other relatives were to be used as witnesses in behalf of defendant and the invoking of the rule effectively deprived defense counsel of having the assistance of these witnesses during the progress of the presentation of the evidence by the State. (emphasis added).

The next paragraph of the memorandum states:

> Paragraph 12(a) asks the question as to the ability of the defendant to distinguish between right from wrong. *Judge Banke indicated at the time of the trial that he was able to make such a distinction and this is true.* At the time of the alleged offense, however, Doctor Sapp testified that in his opinion if the defendant caused the homicide of the victim, he had no way of distinguishing between right and wrong. Doctor Bosch, called as a rebuttal witness for the State, testified that while he did diagnose the defendant as having a mental disorder and in need of further treatment, that he had no information upon which to make a determination as to the ability of the defendant to distinguish between right and wrong at the time his former wife was slain. (emphasis added).

The court believes these comments to be crucial because they indicate that petitioner's own trial counsel, who apparently had the closest contact with Dix during the trial, felt that Dix was competent to stand trial. Had this not been the case, counsel could have renewed the special plea of insanity or moved to have petitioner re-examined because of an inability to assist counsel with the defense of his case or to understand the nature of the proceedings against him. Evidently defense counsel felt that Dix was legally competent, and counsel then proceeded to trial on the general defense of insanity at the time of the commission of the crime.

The third important factor to be considered is prior medical opinion. The record shows that both Dr. Sapp and Dr. Bosch testified that Dix had a mental disorder which probably resulted from the head injury he sustained while in the Navy. However, Dr. Sapp diagnosed Dix as suffer-

ing from a psychotic condition, paranoid schizophrenia and an organic brain syndrome associated with trauma, and seizure disorder, petit mal and psychomotor (T.Tr. 702-703), while Dr. Bosch diagnosed Dix's condition as depressive neurosis (T.Tr. 810). Furthermore, both doctors testified that Dix had an abnormal electroencephalogram (T.Tr. 622, 880), that there was a possibility of psychomotor epilepsy (T.Tr. 880), and that someone who committed a crime while having a psychomotor seizure would likely not remember any incidents of the crime. (T.Tr. 719-720, 853, 880).

The record also shows, however, that Dr. Bosch, after conducting a physical and neurological examination and evaluation, felt that Dix was competent to stand trial. The court notes that Dr. Bosch testified that during the time he was wih Dix, Dix knew what was going on, understood the questions, and answered the questions. Dr. Bosch also stated that Dix's reality contact was good and that at the time Dix was at Central State Hospital he knew the difference between right and wrong (T.Tr. 811). Dr. Sapp also testified that Dix was psychotic, but when Dr. Sapp visited him Dix recognized Dr. Sapp, knew his name, knew where he was, and was able to respond to questions. (T.Tr. 734).

Viewing of the laywitness and psychiatric witness testimony, the court finds that most of the evidence presented focused on whether Dix was able to distinguish right from wrong at the time, immediately before, and after the commission of the crime, and not on whether petitioner was competent to stand trial. In fact, the court believes that the evidence presented which did focus on Dix's

competency to stand trial tended to establish that Dix was competent to stand trial.

In sum, the court concludes that while Dix had a mental disorder which resulted from a head injury while in the Navy, said disorder did not prevent Dix from assisting his trial counsel with the defense of his case and from understanding the nature of the proceedings against him. The court further concludes that neither the petitioner's demeanor at trial, nor the testimony of laywitnesses or of Drs. Sapp and Bosch reasonably raised of should have reasonably raised a *bona fide* doubt in the mind of the trial judge as to Dix's competency to stand trial, and therefore the trial court was not obligated to *sua sponte* conduct a separate competency hearing as required by *Pate v. Robinson, supra. Cf. Chenault v. Stynchcombe, supra.* For the foregoing reasons, habeas relief is DENIED on this ground.[2]

II. THE *SANDSTROM* ISSUE

As his second ground for relief, petitioner contends that the jury instructions given by the trial court permitted the prosecution to prove its case without establishing all the essential elements of the crime beyond a reasonable doubt, and that the instructions shifted the burden onto the petitioner of proving lack of intent or malice.

It is well settled that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Patterson v. New York,* 432 U.S. 197 (1977); *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *In Re Winship,* 397 U.S. 358 (1970). Thus, a

jury instruction which involves a presumption that shifts to the accused the burden of proving one or more essential elements of the crime is unconstitutional. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The Magistrate concluded that the trial court's instructions to the jury at the guilt/innocence phase of petitioner's trial were not unconstitutionally burden-shifting. Petitioner has objected to this finding and contends that the instructions on malice given by the court were substantially similar to the charge on malice found by this circuit to be unconstitutionally burden-shifting, citing *Lamb v. Jernigan*, 683 F.2d 1332, 1341 (11th Cir. 1982); *cert. den.*, — U.S. —, 103 S.Ct. 1276 (1983).

The court's duty in analyzing a *Sandstorm* claim is to examine the crime for which the petitioner has been convicted, and then examine the challenged jury charges to determine if said charges impermissibly and unconstitutionally shift the burden of proof to the petitioner to disprove intent or malice. *See Lamb v. Jernigan, supra,* at 1335-6. In examining the charges for possible constitutional violations, the court must determine "whether a reasonable jury might have failed to understand, from the entire charge, that there was a rebuttable presumption of intent or malice and that they were free to weigh all the evidence." *Corn v. Zant*, 708 F.2d 549, 558 (11th Cir. 1983), citing *Sandstrom v. Montana, supra.*

The court now turns to an examination of the Georgia statute on murder and the actual jury instructions given by the trial court. Under the Georgia statute defining murder, *Ga. Code Ann.* § 26-1101 (recodified as O.C.G.A. § 16-5-1), malice and intent are essential elements of the

crime of murder, which elements must be proven beyond a reasonable doubt. *In Re Winship, supra.* At petitioner's trial, the trial court instructed the jury on the essential elements of malice as follows:

> Now, as I have stated, the offense charged against the defendant in count number one in this bill of indictment is that of murder.
>
> And, in that connection, I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
>
> Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandon and malignant heart.
>
> Malice is an essential element in murder. And, it must exist before any homicide can be murder. Malice, in its legal sense, is not necessarily ill will or hatred. It is the unlawful, deliberate intention, to kill a human being without justification or mitigation or excuse, which intention must exist at the time of killing.
>
> It is not necessary, however, that this unlawful deliebate intention should exist for any particular length of time before the killing. If it enters the mind of a slayer, the moment before he inflicts the fatal wound, that is sufficient.
>
> *The law presumes every intentional homicide to be malicious until the contrary appears from the circumstances of alleviation, justification, mitigation or excuse.*
>
> *The burden is on a slayer whenever an intentional homicide has been proved to make out such circumstances to the satisfaction of the Jury unless such cir-*

cumstances appear from the evidence produced against the slayer. If such evidence produced against the slayer, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist.

If, however, the evidence produced against a slayer, if there be such, does not disclose that the killing was done without malice, then it is incumbent upon the slayer to show that it was done without malice.

I charge you, however, that this presumption which arises against the slayer where an intentional homicide is shown does not arise against a slayer until it be first shown to a moral and reasonable certainty and beyond a doubt that the defendant was the intentional slayer. Unless, it appears from the evidence beyond a reasonable doubt and to a moral and reasonable certainty, that this defendant is the intentional slayer, this presumption does not arise in this case and has no application to the case. And, you will not consider such a rule in passing upon the case.

When and if a killing is proved to your satisfaction to be the intentional act of the defendant, himself, the presumption of innocence with which he enters upon the trial is removed from him. And, the burden is upon him to justify or mitigate the homicide, unless the evidence introduced against him shows justification or mitigation. But, as I have charged you heretofore, the evidence of justification or mitigation may be found in the evidence produced against him. *If there be no evidence introduced to show justification or mitigation and if the evidence introduced shows the homicide to have been committed as charged in the indictment, the burden will then be upon the defendant to show mitigation or excuse.* (Emphasis added).

The court initially notes that most of the jury instructions given in this case are substantially identical to the charge which was upheld in *Corn v. Zant,* 708 F.2d 549

(11th Cir. 1983), and *Corn* is the controlling authority in this circuit to date. Therefore, the court will only address the underlined portion of the jury charge, as those are the only instructions which are somewhat different from those in *Corn,* and upon which a possible *Sandstrom* violation might be based.[3]

The underlined jury instructions essentially state that "the burden is on the defendant" or "it is incumbent upon the defendant" to show "justification or mitigation," or to show "that the killing was done without malice" when the evidence produced against him shows the homicide to have been committed intentionally. On the other hand, the comparative instructions in *Corn* state that "the defendant *may* show justification or mitigation" or "*may* show that the killing was done without malice," "but he is not required to do so."

The court in *Corn* held that the cautionary language "may" . . . "but is not required to do so" was at most a permissible inference that the defendant could, if he so chose, introduce mitigating evidence, and therefore the charge as a whole did not impermissibly shift the burden of proof to the defendant in violation of his due process rights. 708 F.2d at 559. The court also distinguished the instructions in *Corn* from those in *Lamb v. Jernigan, supra.*

In *Lamb,* the Court found a charge which stated that "the law presumes that every homicide is malicious until the contrary appears from circumstances of alleviation, excuse or justification," coupled with "it is incumbent upon the accused to make out such circumstances to your satisfaction unless they appear from the evidence produced against him . . ." to be unconstitutionally burden-shifting

when accompanied solely by the standard charge on burden of proof in a criminal case. 683 F.2d at 1341.

The Court in *Corn* stated that the *Corn* jury heard a charge "replete with cautious explanations that refute[d] Corn's claim that an irrebuttable presumption weighed against him," whereas there was no comparative curative language in *Lamb*. 708 F.2d at 559.

In the instant case, the court finds that several underlined portions of the jury instructions are similar to those instructions found to be unconstitutionally burden-shifting in *Lamb*. Furthermore, the challenged underlined instruction,

> When and if a killing is proved to your satisfaction to be the intentional act of the defendant, himself, the presumption of innocence with which he enters upon the trial is removed from him. And, the burden is upon him to justify or mitigate the homicide, unless the evidence introduced against him shows justification or mitigation. . . .

is virtually identical to the instructions which the Fifth Circuit[4] found to be unconstitutionally burden-shifting in *Tennon v. Ricketts*, 642 F.2d 161 (5th Cir. 1981), and *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980).

Thus, based on the controlling authority in this circuit, the aforementioned underlined jury instructions appear to impermissibly shift the burden on to the defendant to disprove malice.

The court, however, does recognize its obligation to review the challenged instructions in the context of the overall charge, and not in isolation. *Cupp v. Naughten*,

414 U.S. 141, 146-147 (1973). Upon examination of the jury instructions, the court notes that some of the same curative language present in the *Corn* instructions is included in the jury instructions in the case at bar.[5] Nevertheless, this court believes that *Corn* goes much farther in giving cautionary explanations[6] which could create a permissible inference that defendant could produce mitigating evidence but was not required to do so.

In this case, the general burden allocation instructions, and the instruction that criminal intent should not be presumed, read with the aforementioned cautionary instructions, see n.5, were insufficient to rectify the possible burden-shifting instruction on malice. A reasonable jury could have concluded that petitioner had the burden of persuasion and not just the burden of mere production of evidence to show that the killing was done without malice. For the foregoing reasons, this court is compelled to conclude that the jury charge as a whole operated to impermissibly shift the burden of proof to the defendant on an essential element of the crime of murder in violation of petitioner's due process rights. Accordingly, petitioner's conviction and sentence must be set aside unless it is determined that the erroneous jury charge was harmless beyond a reasonable doubt. *Mason v. Balkcom,* 669 F.2d 222, 226 (5th Cir. Unit B 1982), *cert. den.,* — U.S. —, 103 S.Ct. 1260 (1983).[7]

In *Mason,* the Court stated that the unconstitutional, erroneous jury charge might be held harmless beyond a reasonable doubt if: 1) "the evidence of guilt is so overwhelming that the error could not have been a contributing factor in the jury's decision to convict"; or 2) the uncon-

stitutional, burden-shifting instruction "shifts the burden on an element that is not at issue in the trial." 6699 F.2d at 227.

At the outset, the court notes that the second standard is inaplicable to this case because the malice element was clearly at issue in the trial. The court must therefore focus on whether the evidence of guilt in this case was so overwhelming. The court concludes that it was.

The jury had overwhelming evidence that Dix was at Dixie's apartment on the day of the murder, at around 11:00 a.m. At that time he was wearing a blue work shirt and pants. Later that day shortly after 3:00 p.m., Mrs. McPherson, Barbara, and Rita arrived at Dixie's apartment. At this time, Dix was wearing a brown shirt and brown striped pants. Dix stated that Dixie was in the bedroom resting. Mrs. McPherson tried to enter Dixie's bedroom but the door was locked. She then called to Dixie and there was no response. At this point, the defendant pulled a gun and took the three women hostage, taking them to Dixie's car. There was also testimony from Barbara that when asked if there was anything wrong with Dixie, the defendant replied, "Yes, I hurt her." Also, during the time the three women were held hostage, Dix referred at least three times to avoiding contact with the police. The evidence further shows that after Dixie's body was found, a bloodstained ashtray with defendant's fingerprints was found. Also, the bloodstained blue work shirt and pants worn by Dix earlier that morning on the day of the murder were found under a towel behind the clothes hamper. The blood was the same type as the victim's. Finally, the evidence shows that for approximately two weks prior

to his surrender at the sheriff's office in Carroll County, Dix had evaded efforts by law enforcement officers to apprehend him.

Viewing the totality of the evidence presented, this court cannot conclude that the unconstitutional burden-shifting instructions were a contributing factor in the jury's decision to convict the petitioner. Accordingly, habeas relief is DENIED on this ground.

III. THE GODFREY V. GEORGIA ISSUE

As his third ground for relief, petitioner contends that the aggravating circumstances upon which his death sentence is based is overbroad, vague, open-ended, and conducive to arbitrary and capricious application in violation of *Godfrey v. Georgia,* 446 U.S. 420 (1980).

The statutory aggravating circumstances at issue here is *Ga. Code Ann.* § 27-2534.1(b)(7) (recodified as O.C.G.A. § 17-10-30(b)(7)). That section provides that a sentence of death may be authorized in a murder case if the jury minds "[that] the offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

A federal court may review a state's aggravating factors to determine whether they "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* — U.S. —, 103 S.Ct. 2742-2743 (1983). However, the court cannot second-guess a state court's interpretation of an aggravating circumstance if

that interpretation satisfies these constitutional requiremens. *Tucker v. Zant,* 724 F.2d 882 (11th Cir. 1984).

Petitioner argues that the application of this aggravating circumstance is violative of the Eighth and Fourteenth Amendments because the trial judge failed to limit the instructions authorizing the jury to find this aggravating circumstance. The Magistrate found that the requirements of *Godfrey* had been satisfied and therefore there was no violation of the Eighth and Fourteenth Amendments.

Petitioner objects to this finding and argues that the Supreme Court in *Zant v. Stephens, supra,* held that the § (b)(7) aggravating circumstance was unconstitutionally applied in the State of Georgia and therefore a death sentence based solely on § (b)(7), such as the petitioner's, cannot stand. Dix further argues that even if a death sentence based solely on § (b)(7) could be valid, the trial court failed to define the terms of the aggravating circumstance in order to adequately guide the jury's discretion, pursuant to the requirements of *Godfrey.* 446 U.S. at 428-429.

Both arguments are without merit. It is true that the Court in *Zant* stated, "this case does not implicate our holding in Godfrey v. Georgia, 446 U.S. 420 (1980), that the (b)(7) aggravating circumstance construed by the Georgia Supreme Court was unconstitutionally broad and vague." However, the holding in *Godfrey* specifically applied to the facts and circumstances of that case. Furthermore, a limiting instruction is not required in every case. *Westbrook v. Zant,* 704 F.2d 1487, 1504 (11th Cir. 1983); *Stanley v. Zant,* 697 F.2d 955, 971 (11th Cir. 1983). The *Godfrey*

court intimated that the uncontrolled discretion of an uninstructed jury could be cured by review in the Georgia Supreme Court. 446 U.S. at 429. *See also Westbrook v. Zant, supra.*

The *Godfrey* plurality specifically noted that following the Supreme Court decision in *Gregg v. Georgia,* 428 U.S. 153 (1976), the Georgia Supreme Court for the first time articulated some of the conclusions it had reached with respect to the interpretation of § (b)(7). The Supreme Court made reference to, and interpreted two Georgia Supreme Court opinions, *Blake v. State,* 239 Ga. 292, *cert. den.,* 434 U.S. 960 (1977), and *Harris v. State,* 237 Ga. 718 (1976), *cert. den.,* 431 U.S. 933, *reh. den.,* 434 U.S. 882 (1977), stating,

> The *Harris* and *Blake* opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed in *pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

446 U.S. at 431.

The Court further stated that validity of the death sentence "turns on whether, in light of the facts and circumstances of the murders that he was convicted of com-

mitting, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that they involved . . . depravity of mind." *Id.* at 432.

In *Godfrey,* the facts and circumstances indicated that the victims were not tortured nor did they suffer serious physical abuse prior to their deaths. For those reasons, the Supreme Court held that the Georgia Supreme Court review failed to satisfy the criteria mentioned in *Harris, supra* and *Blake, supra,* and therefore the § (b)(7) circumstance had been applied in an unconstitutional manner in *Godfrey.*

The evidence in this case is clearly to the contrary. In *Dix v. State,* 238 Ga. 209 (1977), the Georgia Supreme Court specifically delineated the evidence in the record which supported the jury's findings of the § (b)(7) aggravating circumstance. *See* 238 Ga. at 211.

Reviewing the evidence in the transcript, the court finds that the aggravating circumstance found by the jury is supported by the record. It is clear from the evidence that torture and aggravated battery preceded the victim's death. Thus, this court concludes that the Georgia Supreme Court review in the instant case satisfies the *Harris* and *Blake* criteria, and that the § (b)(7) aggravating circumstance upon which Dix's death sentence was based was not applied in an impermissably vague, overbroad, arbitrary, or capricious manner, in violation of his Eighth and Fourteenth Amendment rights. *See Burger v. Zant,* 718 F.2d 979 (11th Cir. 1983). Accordingly, petitioner is not entitled to habeas relief on this ground.

IV. CHALLENGE TO THE INSTRUCTIONS RELATING TO SENTENCE

As a ninth ground for relief, petitioner contends that the sentence of death is cruel and unusual punishment and deprives him of due process because the trial court failed to adequately instruct his jury concerning the consideration of mitigating circumstances, and failed to adequately inform the jury that a life sentence could be imposed even if a statutory aggravating circumstance were found to exist. (The Court's instructions on these matters are found at T.Tr. 1067-1070). The Magistrate found that the instructions were adequate pursuant to the requirements of *Gregg v. Georgia,* 428 U.S. 153, 164 (1976).

After reviewing all of the instructions, the court finds that they were not sufficient to channel the jury's discretion by *Gregg v. Georgia, supra. See also Moore v. Zant,* 722 F.2d 640, 646-647 (11th Cir. 1983); *Corn v. Zant,* 708 F.2d 549, 558-59 and 560-61 (11th Cir. 1983); *Westbrook v. Zant,* 704 F.2d 1487, 1500-1503 (11th Cir. 1983); *Spivey v. Zant,* 661 F.2d 464, 467-72 (5th Cir., Unit B 1981). The instructions very clearly stated that a death sentence could only be imposed if the jury found beyond a reasonable doubt that the offense was committed under one or more statutory aggravating circumstances. (T.Tr. 1069). The jury was also told that it could impose a life sentence even if it found that there were aggravating circumstances present. (T.Tr. 1070). However, the Court failed to define mitigating circumstances or to describe their nature and function.

In *Spivey v. Zant,* 661 F.2d at 471, the Court stated:

> In light of *Lockett, Gregg,* and *Chenault,* we hold that the eighth and fourteenth amendments require that when a jury is charged with the decision whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . ." *Jurek v. Texas,* 428 U.S. at 274, 96 S.Ct. at 2957. In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations. The constitution does not require the use of the words mitigating circumstances." So long as the instruction clearly communicates that the law recognizes the existence of circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment, *Coker v. Georgia,* 433 U.S. 584, 590-91, 97 S.Ct. 2861, 2865, 53 L.Ed.2d 982, this portion of the constitutional requirement is satisfied.

The only instruction on mitigating circumstances in this case was as follows: ". . . You are authorized to consider all facts and circumstances if you find any, in extenuation and mitigation of punishment." (T.Tr. 1067-1068. In *Finney v. Zant,* 709 F.2d 643, 646-47 (11th Cir. 1983) and *Westbrook v. Zant,* 704 F.2d at 1501, a jury instruction virtually identical to the one in this case was found to be constitutionally inadequate. The Court in

Finney said, "An authorization to consider mitigating circumstances is a hallow instruction when unaccompanied by an explanation informing the jury why the law allows such a consideration and what effect a finding of mitigating circumstances has on the ultimate recommendation of sentence." 709 F.2d at 647.

In the case at bar, the trial court failed to communicate clearly to the jury "that the law recognizes the existence of facts or circumstances which, though not justifying or excusing the offense, may properly be considered in determining whether to impose the death sentence." *Spivey v. Zant,* 661 F.2d at 472. Accordingly, petitioner's sentence must be set aside.

V. GROUNDS RELATING TO CRUEL AND UNUSUAL TREATMENT

Grounds four, five, six, and twelve challenge whether the death penalty constitutes cruel and unusual punishment. The Magistrate found that all four arguments raised by the petitioner were without merit.

Petitioner contends, as his fourth ground for relief, that the application of the death penalty to him is arbitrary and capricious and violates the Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner fails to state a claim under the Eighth Amendment. It is clear from the Supreme Court decision in *Gregg v. Georgia,* 428 U.S. 153 (1976), that the Georgia death penalty is not *per se* cruel and unusual punishment in violation of the Eighth Amendment. Furthermore, in *McClesky v. Zant,* No. C8-2434A (N.D.Ga. February 1, 1984), the Court addressed the issue of whether the death

penalty was applied arbitrarily and capriciously in violation of the Fourteenth Amendment. The Court concluded that it was not. *Id.* at 90. Likewise, this court finds the petitioner's argument to be without merit. The facts and circumstances of this case clearly indicate that the death penalty was not applied arbitrarily. The law requires that a jury find that an aggravating circumstance exists before the death penalty may be imposed. In this case, the jury found that the murder involved inhuman torture, and the facts of this case clearly corroborate the jury's finding.

As his fifth ground for relief, petitioner contends that the death penalty is an excessive penalty in that its theoretical justifications are groundless and irrational in fact. Specifically, petitioner argues that executions have no deterrent effect; that executions are socially sanctioned violence; that public sentiment for retribution is not so strong as to justify use of the death penalty; and that no penal purpose is served by execution that is not also served by life imprisonment. The Magistrate correctly noted that these arguments are philosophical and not legal in nature, and therefore they do not rise to the level of a constitutional claim.

Petitioner contends, as his sixth ground for relief, that the death penalty is cruel and unusual punishment under the facts of this case when all factors relating to the offense and the offender, including the mitigating circumstances, are considered. Since the court has already determined that the petitioner must be resentenced because the sentencing instructions violated petitioner's Eighth and Fourteenth Amendment rights, the court need not address this issue.

Finally, as his twelfth ground, Dix contends that the means used in Georgia to inflict the death penalty constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The court disagrees with petitioner's argument as it is well settled that death by electrocution is not cruel and unusual punishment, and therefore does not violate the Eighth and Fourteenth Amendments. *See Spinkellink v. Wainwright,* 578 F.2d 582 (5th Cir. 1978). *cert. denied,* 440 U.S. 976 *reh. denied,* 441 U.S. 937.

For the foregoing reasons, petitioner is not entitled to habeas relief on any of these grounds, except to the extent provided herein.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

As his eighth ground for habeas corpus relief, petitioner contends that he was denied effective assistance of counsel because: 1) his trial attorney improperly withdrew the special plea of insanity; 2) his attorney failed to challenge the composition of the grand and traverse jury pools; and 3) his attorney failed to present mitigating evidence other than petitioner's own testimony. The Magistrate concluded that petitioner received effective assistance of counsel.

It is well settled that a defendant in a criminal trial has a constitutional right to effective assistance of counsel under the Sixth Amendment, and the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335 (1963). The constitutional standard for effective assistance of counsel is counsel "reasonably likely to render and rendering reasonably effective as-

sistance given the totality of the circumstances." *House v. Balkcom,* 725 F.2d 608 (11th Cir. 1984), quoting *Washington v. Strickland,* 693 F.2d 1243, 1250 (5th Cir. Unit B 1982) (en banc), *cert. granted,* — U.S. —, 103 S.Ct. 2451 (1983); *Tucker v. Zant,* 724 F.2d 882, 892 (11th Cir. 1984); *McNeal v. Wainwright,* 722 F.2d 674, 676 (11th Cir. 1984). However, effective counsel does not mean errorless counsel or counsel judged ineffective by hindsight. *Corn v. Zant,* 708 F.2d 549, 561 (11th Cir. 1983); *Ford v. Strickland,* 696 F.2d 804, 820 (11th Cir. 1983) (en banc).

A petitioner seeking to overturn his conviction on the basis of ineffective assistance of counsel has the burden of establishing ineffectiveness and prejudice. *Birt v. Montgomery,* 725 F.2d 587 (11th Cir. 1984); *Washington v. Strickland,* 693 F.2d 1250; *King v. Strickland,* 714 F.2d 1481, 1485 (11th Cir. 1983); *Adams v. Wainwright,* 709 F.2d 1443, 1445 (11th Cir. 1983). The petitioner must prove that "the ineffective assistance created not only 'a *possibility* of prejudice but that [it] worked to [his] *actual* and substantial disadvantage.'" *Washington v. Strickland,* 693 F.2d at 1258, quoting *United States v. Frady,* 456 U.S. 152, 170 (1982); *Foster v. Strickland,* 707 F.2d 1339, 1342 (11th Cir. 1983); *Corn v. Zant,* 708 F.2d at 561. Prejudice means more than mere detriment to petitioner's case. *Adams v. Balkcom,* 688 F.2d 734, 739 (11th Cir. 1982), citing *Washington v. Watkins,* 655 F.2d 1346, 1360 (5th Cir. 1981), *cert. denied,* 456 U.S. 949 (1982).

Petitioner's first contention is that he received ineffective assistance of counsel when his trial counsel withdrew the special plea of insanity prior to trial. In his objections to the Magistrate's Report and Recommendation, petitioner contends that trial counsel failed to conduct a

reasonable substantial investigation into the issue of petitioner's competency to stand trial, and instead his attorney withdrew the special plea of insanity prior to trial. Petitioner argues that had trial counsel consulted with Dr. Sapp concerning petitioner's competency to stand trial, Dr. Sapp would have informed him that petitioner was incompetent to stand trial. Petitioner further contends that in light of the available psychiatric evidence that he was not mentally competent to stand trial, his attorney's withdrawal of the plea resulted in a later failure to litigate the issue and this act thus constituted ineffective assistance of counsel.

It remains undisputed that petitioner's trial counsel withdrew the special plea of insanity prior to trial. However, this court does not find such withdrawal of the special plea to be ineffective assistance of counsel, but instead believes said withdrawal of the plea to be more of a tactical decision. The record shows that the special plea of insanity was only withdrawn after petitioner had been examined and evaluated at Central State Hospital and had been found competent to stand trial. Furthermore, as previously stated in Part I of this Order, the laywitness and psychiatric testimony did not raise a *bona fide* doubt as to the petitioner's competency to stand trial. Moreover, trial counsel's comments in the "Memorandum to be Attached to the Report of the Trial Judge" (see Part I, *supra*) clearly indicate that trial counsel felt Dix was legally competent to stand trial. Accordingly, there is no ineffective assistance of counsel on this ground. *Cf. Foster v. Strickland, supra.*

Petitioner next contends that trial counsel was ineffective because he failed to challenge the composition of

petitioner's grand and traverse juries. Petitioner argues that both jury pools were underrepresentative of blacks and women. Specifically, petitioner has offered to prove that although the population of Clayton County, where petitioner was tried, was 50.4% women and 4.5% black persons, the grand jury pool from which petitioner's indicting grand jury was drawn was only 11.3% women and 2.7% black persons; the traverse jury pool was only 36.2% women and 1.7% black persons.

Assuming without deciding that a successful challenge to the composition of the grand and traverse juries could be made, there is insufficient evidence in the record to sustain a finding of ineffective assistance of counsel on this ground. *See Davis v. Zant,* 721 F.2d 1478, 1490 (11th Cir. 1983), *reh. en banc granted,* — F.2d — (11th Cir. 1984). Moreover, given the overwhelming evidence of petitioner's guilt already mentioned herein, any error which might have resulted from trial counsel's failure to challenge the composition of the grand and traverse juries is harmless beyond a reasonable doubt. *See generally, Chapman v. California,* 386 U.S. 18, 24 (1967).

Petitioner's third contention is that counsel was ineffective because he failed to present mitigating evidence on petitioner's behalf during the sentencing phase of trial. Petitioner contends that relatives and friends should have been called in order to present to the jury some evidence of his character prior to the murder.

At the sentencing phase of petitioner's trial, trial counsel presented no evidence in mitigation of sentence other than the testimony of the petitioner himself. The magistrate determined that evidence in mitigation of sen-

tence was presented during the guilt/innocence phase of petitioner's trial (Report and Recommendation, pp. 48-51). Petitioner has objected to this finding contending that the evidence introduced during the guilt/innocence phase of trial was limited to evidence relevant to the defense of insanity at the time of the commission of the offense. Petitioner argues that this limitation necassarily precluded the broad range of evidence concerning petitioner's entire background and character admissible only at the penalty phase of trial.

The sentencing phase in any criminal case is crucial, and counsel is obligated to be prepared for that part of the trial. *Stanley v. Zant,* 697 F.2d 955, 963 (11th Cir. 1983). As noted in *King v. Strickland,* 714 F.2d at 1490 (11th Cir. 1983), the Eleventh Circuit has emphasized the importance of pre-trial preparation and investigation. Failure to present mitigating evidence is clearly a factor suggesting ineffectiveness of counsel. *Id.* at 1491.

In the instant case, the issue is not whether petitioner's trial attorney failed to present any mitigating evidence, but whether he presented enough mitigating evidence. At the sentencing phase of trial, the only mitigating evidence presented was the testimony of the petitioner himself. However, during the guilt/innocence phase of the trial, the jury heard testimony from Dix's mother, friends, and relatives, and also from the psychiatrists regarding Dix's character and mental state. Said testimony could be considered mitigating evidence. Furthermore, the Judge instructed the jury that they were authorized to consider all of the evidence presented during the trial in arriving at a determination as to whether the death penalty or a life sentence should be imposed (T.Tr. 1067).

This court is persuaded that the testimony of the defendant at the sentencing phase coupled with the testimony of Dix's mother, friends, other relatives, and Drs. Sapp and Bosch at the guilt/innocence phase, was sufficient presentation of mitigating circumstances, and therefore the court does not find ineffective assistance of counsel on this ground.

Nevertheless, since the court has already determined that the petitioner must be resentenced, petitioner will have an opportunity at that time to resubmit mitigating evidence.

VII. TIMELY NOTICE OF AGGRAVATING CIRCUMSTANCES

As his seventh ground for habeas relief, petitioner contends that the death penalty was assessed against him on the basis of fundamentally unfair proceedings. Specifically, he contends that he was not given notice and an opportunity to present evidence and argument directed to specific issues determinative of life and death because no aggravating circumstances charged to or considered by the trial jury were alleged in petitioner's indictment.

Under Georgia law, a sentence of death may only be imposed where the jury finds a statutory aggravating circumstance, O.C.G.A. § 17-10-31, however, there is no requirement that these aggravating circumstances be alleged in an indictment against the accused. *House v. Stynchcombe,* 239 Ga. 222, 224 (1977); *Smith v. State,* 236 Ga. 12, 20 (1976). The court agrees with the Magistrate that this ground does not rise to the level of a constitutional claim. Accordingly, no relief can be granted on this ground.

VIII. FAILURE TO TRANSCRIBE CLOSING ARGUMENTS

The transcript of petitioner's trial does not include the closing arguments of counsel. Petitioner contends, as his tenth ground for relief, that the failure to record counsel's arguments is a constitutional violation which requires vacation of his death sentence. The Magistrate rejected this argument based upon *Stephens v. Zant,* 631 F.2d 397, 402-04 (5th Cir. 1980), *rev'd* on other grounds, — U.S. —, 103 S.Ct. 2733 (1983), and upon petitioner's failure to allege that any erroneous, inflammatory, or prejudicial remarks were made by the prosecutor.

The court recognizes its obligation to review each death sentence to determine whether the sentence was imposed under some passion or prejudice. *See Gregg v. Georgia,* 428 U.S. 153, 198 (1976); O.C.G.A. § 17-10-35(c)(1). The court finds that the trial record in this case contains sufficient, transcribed evidence upon which a conviction and sentence can be based. Therefore, absent any concrete allegation or showing that the prosecutor made inflammatory or prejudicial remarks, "it is well settled that failure to transcribe counsel's arguments is not a constitutional violation requiring vacation of a death sentence." *Corn v. Zant,* 708 F.2d 549, 560 (11th Cir. 1983), citing *Stephens v. Zant, supra.* Accordingly, this argument is without merit, and habeas relief is DENIED on this ground.

IX. DENIAL OF FUNDS

As his thirteenth ground for habeas relief, petitioner contends that the Tattnall County Superior Court's denial of his motion for funds to adequately present his state

habeas claims to that court denied him equal protection. The Magistrate rejected this argument, finding that there was no statutory provision providing for funds for witnesses in a civil habeas proceeding. The Magistrate further stated that petitioner had failed to carry his burden of proof to establish sufficient facts to warrant a finding of denial of constitutional rights.

Petitioner has objected to the Magistrate's findings and argues that because of the court's denial of his motion for funds he did not have the funds to bring witnesses to court, and the only witnesses who testified at his state habeas proceeding were those who voluntarily appeared and paid their own expenses. Therefore, petitioner contends that he is entitled to have an evidentiary hearing on any factual questions raised in his petition because the material facts were not adequately developed at any state court hearing, and the petititends that he is entitled to have an evidentiary hearing on any factual questions raised in his petition because the material facts were not adequately developed at any state court hearing, and the petitioner did not deliberately bypass any opportunity to develop the material facts in state court, citing *Thomas v. Zant*, 697 F.2d 977 (11th Cir. 1983).

First, under Georgia law, a habeas petitioner, even in a death penalty case, has no right to receive state funds to employ counsel, investigators, and expert witnesses to establish the claims he raises in his state habeas proceeding. *Pulliam v. Balkcom*, 245 Ga. 99, 100 (1980); *Spencer v. Hopper*, 243 Ga. 532, 537 (1979); *Harris v. Hopper*, 243 Ga. 244, 245 (1979). Thus, the granting or denial of a motion for funds lies within the sound discretion of the court,

and as the Magistrate correctly noted, petitioner has failed to allege an abuse of discretion by the Superior Court Judge. his claims in the state habeas proceedings.

Furthermore, 28 U.S.C. § 2254(d) provides that a state court's findings are entitled to a presumption of correctness unless the petitioner establishes or it otherwise appears, or the respondent admits— . . ." (3) that the material facts were not adequately developed at the state court hearing." *See also Sumner v. Mata,* 449 U.S. 539 (1981); *Moore v. Zant,* 722 F.2d 640, 649 (11th Cir. 1983); *Thomas v. Zant, supra,* at 979, n.2. Petitioner has failed to set forth sufficient facts to establish that any additional evidence or testimony from the witnesses who did not appear at the state habeas proceeding would not be cumulative, and would be material. *See Tucker v. Zant,* 724 F.2d 882, 898 (11th Cir. 1984). Accordingly, petitioner has not carried his burden of showing that the state habeas proceeding did not adequately develop the material facts, and a bare assertion is insufficient to warrant an evidentiary hearing.

X. CHALLENGES TO THE COMPOSITION OF DIX'S GRAND AND TRAVERSE JURIES

As his fourteenth and fifteenth grounds for relief, petitioner contends respectively that his grand jury and traverse jury pools were underrepresentative of blacks and women, and therefore were composed in an unconstitutional manner.

It is well settled under Georgia law that failure to make a timely challenge to the alleged unconstitutional composition of the grand or traverse juries precludes a petitioner from later raising this matter as a ground for

habeas relief. *Ga. Code Ann.* § 50-127(1) (recodified as O.C.G.A. § 9-14-42). Furthermore, this state procedural rule will be upheld by a federal court unless the petitioner shows "cause" for noncompliance with the state statute and "actual prejudice." *United States v. Frady*, 456 U.S. 152 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976); *Birt v. Montgomery*, 725 F.2d 587 (11th Cir. 1984); *Smith v. Kemp*, 715 F.2d 1459 (11th Cir. 1983).

It appears that no timely challenge to the composition of the grand or traverse juries was made before or during the trial and petitioner has not shown cause for said noncompliance or actual prejudice. Furthermore, the court has already concluded that there was no ineffective assistance of counsel with respect to this ground. Therefore, petitioner is not entitled to habeas relief on this ground.

XI. CHALLENGE TO GEORGIA'S APPELLATE REVIEW PROCEDURE

Petitioner contends, as his eleventh ground for relief, that the Georgia statutory provisions and actual practices governing appellate review of death sentences are inadequate in that they deny petitioner the effective assistance of counsel; in that they deny petitioner a fundamentally fair hearing and reliable determination of the issue of life or death; and that they deny petitioner the basic tools of an adequate defense and appeal because of his indigency. More specifically, petitioner contends that in its comparative proportionality review, the Georgia Supreme Court considered and referred to prior cases in which it failed to set forth the underlying facts of the crime or the character of the criminal offender. Petitioner argues that this prac-

tice disabled his counsel from preparing or presenting argument.[8]

At the outset, the court notes that in *Gregg v. Georgia, supra,* the Supreme Court set forth the entire Georgia statutory scheme where a death sentence could be imposed and explicitly approved the procedures for appellate review of a death sentence by the Georgia Supreme Court. Georgia's capital sentencing law provides that the supreme court is required to conduct an expedited review of every death sentence. O.C.G.A. § 17-10-35. In reviewing the sentence, the Georgia Supreme Court must determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(c) (3). Furthermore, the court must "include in its decision a reference to those similar cases which it took into consideration." O.C.G.A. §§ 17-10-35(e).

In its decision affirming the petitioner's conviction and death sentence, the Georgia Supreme Court included an appendix listing comparative cases (with citations) which the court considered in determining whether the petitioner's death sentence was disproportionate to the sentence imposed in similar cases, considering the crime and the character of the defendant. *See Dix v. State,* 238 Ga. 209, 217 (1977). The petitioner was not precluded from reviewing these cases in order to prepare his argument. Furthermore, as Georgia's appellate review procedures were approved in *Gregg, supra,* and those procedures were followed in this case, petitioner's contentions are without merit. *See Tucker v. Zant,* 724 F.2d 882, 895-96 (11th Cir. 1984).

CONCLUSION

The court has thoroughly reviewed the record and has concluded that the trial court's instructions to the jury regarding mitigating circumstances were constitutionally defective, violating petitioner's Eighth and Fourteenth Amendment rights. Accordingly, habeas corpus relief is hereby GRANTED as it pertains to the imposition of the death sentence. This case is REMANDED to the Superior Court of Clayton County, and the respondent is hereby ORDERED to commence resentencing procedures within 120 days from the date on which this judgment becomes final. Failure to do so will result in the imposition of a life sentence without further order of this court. In the event the matter is appealed, this Order shall be automatically stayed pending the filing of the mandate from the Eleventh Circuit Court of Appeals in this court. Respondent is further DIRECTED to file a certified copy of petitioner's new sentence, if such is obtained, with the clerk of this court.[9]

SO ORDERED, this 20th day of March, 1984.

/s/ _____
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

FOOTNOTES

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[1] *Ga. Code Ann.* § 27-1502 (recodified as O.C.G.A. § 17-7-130) provides in pertinent part:

> (a) Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be first tried by a special jury.

[2] Because of this ruling, the court need not address the issue of whether a meaningful *nunc pro tunc* competency hearing could be held.

[3] The underlined instructions represent most of the instructions challenged by the petitioner. Any instructions not underlined or included herein were substantially, if not completely, identical to the instructions which were upheld in *Corn*. The court further notes that the last three paragraphs of the charges on intent (T.Tr. 1032) have been challenged in several cases and have been upheld as not unconstitutionally burden-shifting. *Tucker v. Francis*, 723 F.2d 1504 (11th Cir. 1984); *Corn v. Zant, supra*. Therefore, the court need not address the validity of these instructions.

[4] The Fifth Circuit decisions rendered prior to October 1, 1981 are adopted as precedent in the Eleventh Circuit. *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981).

[5] Both the *Corn* instructions and the instructions in the case *sub judice* contained the following cautionary instructions:

> If such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist.
>
> . . .
>
> This presumption . . . does not arise against the slayer unless it be first show to a moral and reasonable certainty and beyond a reasonable doubt that the defendant was the intentional slayer.

[6] The trial court also specifically instructed the *Corn* jury that "the burden is on the State to prove such intent beyond a reasonable doubt and the burden is not on the defendant to disprove intention." 708 F.2d at 569. As previously stated, the Court in *Corn* found that the jury charge was replete with cautionary explanations. The Court specifically noted the instruction in this footnote, which was given with the general burden allocation instructions, the instruction that criminal intent should not be presumed, the cautionary instructions referred to in n.5 herein, and the "may" . . . "but is not required to do so" language.

[7] *Mason v. Balkcom* is binding on the Eleventh Circuit as a post-September 30, 1981 decision of a Unit B panel of the former Fifth Circuit. *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

[8] In the recent Supreme Court case of *Pulley v. Harris*, — U.S. —, 104 S.Ct. 871 (1984), the Supreme Court held that proportionality reviews are not required by the Constitution, provided that the state's "capital sentencing system [is not] so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review. . . ." *Id.* at —, 104 S.Ct. at 873. However, since the Georgia statutory scheme does provide for a proportionality review, and such review is designed to prohibit the imposition of a death penalty arbitrarily or disproportionately, the court will address this issue briefly.

[9] The court having ruled on the Magistrate's Report and Recommendation, petitioner's motion to continue the proceedings is MOOT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HORACE WILLIAM DIX,	)	
	)	CIVIL
Petitioner	)	ACTION
	)	
vs.	)	FILE NO.
	)	C80-826A
LANSON NEWSOME, Warden,	)	
Georgia State Prison,	)	(Filed June 21,
	)	1984)
Respondent	)	

ORDER OF COURT

It is hereby ORDERED that the last paragraph on page 46 (and continued on page 47) of the court's Order entered March 20, 1984 shall be AMENDED so as to include certain lines inadvertently left out:

> First, under Georgia law, a habeas petitioner, even in a death penalty case, has no right to receive state funds to employ counsel, investigators, and expert witnesses to establish the claims he raises in his state habeas proceeding. *Pulliam v. Balkcom,* 245 Ga. 99, 100 (1980); *Spencer v. Hopper,* 243 Ga. 532, 537 (1979); *Harris v. Hopper,* 243 Ga. 244, 245 (1979). Thus, the granting or denial of a motion for funds lies within the sound discretion of the court, and as the Magistrate correctly noted, petitioner has failed to allege an abuse of discretion by the Superior Court Judge. Absent an allegation or showing of abuse of discretion, this court cannot hold that the Tattnall County Superior Court Judge, in exercising his dis-

cretion, deprived petitioner of a full and fair hearing on his claims in the state habeas proceedings.

SO ORDERED, this 20th day of July, 1984.

/s/ _____
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

APPENDIX C

Horace William DIX,

Petitioner-Appellee,
Cross-Appellant,

v.

Ralph KEMP, Warden, Georgia State Prison, Respondent-Appellant,

Cross-Appellee.

No. 84-8342.

United States Court of Appeals,
Eleventh Circuit.

June 5, 1985.

Appeals from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and JOHNSON, Circuit Judges, and DUMBAULD*, District Judge.

JOHNSON, Circuit Judge:

Horace William Dix was convicted of murder in 1975 in the Superior Court of Clayton County, Georgia. He later sought post-conviction relief on several grounds, all of which were denied by the state courts. The federal district court granted a writ of habeas corpus on the ground that the state trial court's charge to the sentencing jury

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* Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

did not adequately explain the nature and function of mitigating circumstances. The district court declined to grant relief on any other claim. We hold that the sentencing charge did indeed fail to channel properly the discretion of the jury regarding mitigating circumstances. Furthermore, the trial court's instruction impermissibly shifted the burden of proof to the defendant under circumstances where it could not be considered harmless error. Accordingly, we affirm in part and reverse in part.

The petitioner and his wife, Dixie Jordan, divorced in 1974. One month after the divorce, he came to visit at her house. The two were alone in the house when they began to quarrel. She threw an ashtray at him and he claims to remember nothing about what transpired afterwards. His wife's body, which was found in a bedroom of the house, showed that she had been tortured and stabbed to death.

The trial focused on the sanity of Dix at the time of the killing.[1] He presented evidence tending to show that he was insane at the time of the killing, including a history of mental disability beginning with a head injury sustained while in the Navy, a pattern of bizarre behavior close to the time of the killing (including his surprise that his wife had not visited him in jail), and the testimony of a psychiatrist who had examined him, Dr. William P. Sapp. The State presented its own expert witness, Dr. Miguel Bosch, who believed that Dix suffered from a mental disorder, a depressive neurosis, which did not relieve him of

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1. Dix was also tried for the subsequent kidnapping of his mother-in-law, sister-in-law and niece. Those charges are not at issue here.

criminal responsibility for the killing. The jury, after hearing the instructions on malice and intent now challenged on this appeal, returned a guilty verdict. The trial then entered its sentencing phase and the jury heard the instructions from the trial court regarding mitigating circumstances. The jury recommended the death sentence.

I. Jury Instructions Regarding Mitigating Circumstances

In the first of his two extant grounds for requesting habeas corpus relief,[2] the petitioner claims that the trial judge's charge to the sentencing jury did not satisfy the requirements of the Eighth Amendment because it failed to give proper guidance regarding the nature and function of mitigating circumstances. The Eighth Amendment does require that the jury consider all mitigating circumstances in determining the appropriate and individualized sentence for a particular defendant. *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). As the court explained in *Spivey v. Zant,* 661 F.2d 464

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2. Dix originally enumerated 15 different grounds for relief. The district court granted relief on one ground and denied all the other claims. The state appealed the district court's ruling on the *Spivey* issue, while the petitioner filed a cross-appeal on four other grounds: (1) the *Sandstrom* claim, (2) the alleged failure of the trial court properly to instruct the jury regarding aggravating circumstances, (3) the failure of the trial court to hold a hearing to determine his competence to stand trial in violation of *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), and (4) the unconstitutionality of the death penalty as applied in Georgia (a claim identical to the one heard by the *en banc* court in *McCleskey v. Kemp,* 753 F.2d 877 (11th Cir.1985). Counsel for petitioner abandoned at oral argument all claims except for the *Spivey* and *Sandstrom* claims.

471 (5th Cir. Unit B 1981), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982), a requirement that the jury consider all relevant mitigating evidence would have no meaning at all unless the jury understands how to recognize and evaluate a mitigating circumstance. *See also Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir.1978). Therefore, the trial judge at the sentencing phase must give the jury careful instructions to explain the nature and function of mitigating circumstances.[3]

The exact contours of such instructions must be decided on a case-by-case basis. No single incantation, such as the use of the words "mitigating circumstances," is necessary in every case. Nevertheless, several recent precedents lead us to conclude that the instructions in this case did not properly guide the jury in its consideration of mitigating circumstances.

In *Spivey v. Zant*, 661 F.2d 464 (5th Cir. Unit B 1981), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982), the court stated that in most cases[4] a judge must

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3. The failure to explain the nature and function of mitigating circumstances is distinct from the claim that the charge fails to authorize the consideration of mitigating circumstances despite the presence of statutory aggravating circumstances.

The Supreme Court's recent opinion in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), does not, as the state suggests, relieve this court of its duty to scrutinize jury instructions regarding mitigating circumstances. The case dealt with appellate review of aggravating circumstances but did not in any way imply that such review was the exclusive or primary inquiry of a reviewing court.

4. The court in *Spivey* allowed for an exception to this requirement when the sentencing procedures apart from the trial

(Continued on following page)

tell the jury "what a mitigating circumstance is and what its function is in the jury's sentencing deliberations." The instruction in that case, which merely authorized the jury to consider all the evidence before them, failed "to communicate to the jury that the law recognizes the existence of facts or circumstances which, though not justifying or excusing the offense, may properly be considered in determining whether to impose the death sentence." *Id.* at 472 (footnote omitted); *see also Goodwin v. Balkcom,* 684 F.2d 794, 801-02 (11th Cir.1982), *cert. denied,* 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983).

Later cases have noted that a trial court does not fulfill its responsibility simply by informing a jury that it may consider mitigating circumstances. *Morgan v. Zant,* 743 F.2d 775 (11th Cir.1984); *Finney v. Zant,* 709 F.2d 643 (11th Cir.1983); *Westbrook v. Zant,* 704 F.2d 1487 (11th Cir.1983). The words "mitigating circumstances," while they have meaning to most jurors, still do not adequately communicate the precise nature or function of that concept in the context of a sentencing trial. Mere reference to the possible consideration of mitigating circumstances does not tell a jury "why the law allows such a consideration and what effect a finding of mitigating circumstances has on the ultimate recommendation of sentence." *Westbrook v. Zant,* 704 F.2d at 1503.

(Continued from previous page)

court's instructions satisfactorily focus the jury's consideration of the circumstances of the offense and the offender. Special interrogatories might provide such a focus. The procedures set forth in the Georgia death penalty statute did not suffice in *Spivey;* obviously the same holds true in this case.

The trial judge in this case gave the following instruction at the sentencing trial regarding mitigating circumstances:

> You are authorized to consider all of the facts and circumstances[,] if you find any, in extenuation and mitigation of punishment. You are also authorized to consider all of the facts and circumstances, if you find any, regarding the gravity of the offense and your knowledge of the personal background of the defendant as shown to you by the evidence.

This instruction could be taken as a proper explanation of the nature of mitigating circumstances. Yet, it might have left the jury confused about the nature of mitigating circumstances, for first it mentions mitigating circumstances and then it says "you are *also* authorized to consider . . . " (emphasis added). A juror could have concluded from this that the facts and circumstances discussed in the second sentence were separate and distinct from the mitigating circumstances introduced in the first sentence.

Further, and most importantly, the instruction did not explain the function of a mitigating circumstance. The charge never set forth the reasons that a mitigating circumstance might be significant and never explained that mitigating circumstances could lead a jury to recommend mercy. The courts in *Morgan* and *Westbrook* both stressed that the failure to explain the function of mitigating circumstances was a serious shortcoming that rendered the instructions "hollow." 743 F.2d at 779; 704 F.2d at 1503. Likewise in this case, the court's charge left the jury without proper guidance in its sentencing deliberations, which amounted to a violation of the Eighth and Fourteenth

Amendments. The district court properly granted habeas corpus relief on this ground.

II. *Sanstrom* Claim

The petitioner also takes issue with the jury charge given at the liability stage of the trial regarding malice and intent.[5] He claims that it impermissibly shifted the burden of proof to him in contravention of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The familiar instructions used by the trial court in this case have been considered in previous cases of this court

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5. The trial court gave the following charge on the issues of malice and intent:

> The law presumes every intentional homicide to be malicious until the contrary appears from the circumstances of alleviation, justification, mitigation or excuse. . . . When and if a killing is proved to your satisfaction to be the intentional act of the defendant, himself, the presumption of innocence with which he enters upon the trial is removed from him. And, the burden is upon him to justify or mitigate the homicide, unless . . . there be no evidence introduced [against him that shows] justification or mitigation. . . .
>
> I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will. But, this presumption may be rebutted. . . .
>
> If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. However, this presumption may be rebutted.

The charge also contained some general curative instructions: "It is for you, the Jury, to say whether the evidence in this case . . . sufficiently identif[ies] this defendant as the slayer beyond a reasonable doubt. . . . A person will not be presumed to act with criminal intention."

and violate the proscriptions of *Sandstrom* in a number of ways.

These instructions establish a mandatory presumption: they go beyond simply authorizing a jury to draw inferences and state that "the law presumes."[6] They ask the jury to presume criminal intent from the use of a deadly weapon, as in *Mason v. Balkcom*, 669 F.2d 222 (5th Cir. Unit B 1982), *cert. denied*, 460 U.S. 1016, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983), and to presume that an intentional killing is malicious unless evidence of justification or mitigation shows otherwise, as in *Lamb v. Jernigan* 683 F.2d 1332, 1341 (11th Cir.1982), *cert. denied*, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). As in *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, — L.Ed.2d — (1985), the instruction states that the acts of a person of sound mind and discretion "are presumed" to be the product of the person's will. The jury was not told that they had a choice or that they *might* infer the conclusion. *Id.* at —, 105 S.Ct. at 1971 (quoting *Sandstrom v. Montana*, 442 U.S. 510, 515, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979)).

While the instructions duly note that the defendant may rebut any presumptions against him, they do not describe how he could go about making such a rebuttal. There is no mention of the quantum of evidence necessary to rebut the presumption. Because of this omission, the jury could have concluded that Dix had to produce

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6. As the district court noted, these instructions contain little of the extensive permissive language present in *Corn v. Zant*, 708 F.2d 549 (11th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984).

more than "some" evidence to rebut the presumption.[7] *Davis v. Kemp,* 752 F.2d 1515 (11th Cir.1985) (en banc). As the Supreme Court recently held in *Francis v. Franklin,* — U.S. —, 105 S.Ct. 1965, — L.Ed.2d — (1985), the statement that a presumption "may be rebutted," when combined with mandatory language such as "the law presumes," could indicate to a reasonable juror that the defendant bears an affirmative burden of persuasion once the State proves the underlying act giving rise to the presumption. This ambiguity, together with the other misleading aspects of the instruction, created a real risk that the jury would shift the burden of proof to the defendant. The instruction at Dix's trial violated constitutional standards even more clearly than the instructions in *Davis.*

Since the charge to the jury in this case violated the presumption of innocence, the conviction cannot stand unless the State can demonstrate that the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Brooks v. Francis,* No. 83-8028, slip op. at —, — F.2d — (11th Cir.,

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7. The intent charge clearly transgresses on this score. There is one possible way, however, to argue that the malice charge delineates the weight of the burden placed on the defendant. Because malice is presumed only if there is "no evidence" of justification or mitigation in the case presented against the defendant, the defendant might be able to rebut the presumption by presenting "some" evidence of justification or mitigation.

This maneuver does not save the malice charge because other portions of the malice charge contradict it, including the statement that the defendant must show justification or mitigation to the "satisfaction" of the jury. Despite the possible saving interpretation, the jury still could have misunderstood the malice charge as a whole.

1985) (en banc). Harmless error can be shown in one of two ways: either the charge could relate to an element not at issue in the trial, or the evidence of guilt could be so overwhelming that the error could not contribute to the jury's decision to convict. *Drake v. Francis,* No. 83-8047, slip. op. at —, — F.2d — (11th Cir., 1985) (en banc); *Davis v. Kemp, supra; Mason v. Balkcom, supra.* Both malice and intent were at issue in the trial because the defendant presented evidence to support an insanity defense. Insanity, of course, negates criminal intent and malice.

McClesky v. Kemp, 753 F.2d 877, 901 (11th Cir. 1985) (en banc), does not compel another conclusion because in that case the defendant made absolutely no effort to deny that an intentional killing had taken place. His choice of defenses, coupled with overwhelming evidence that an intentional killing had taken place, led the court to conclude that the *Sandstrom* error was harmless. Similar reasoning led the court in *Davis v. Kemp,* to reach the same result. In each of those cases, the court stressed the distinction between non-participation defenses such as the ones presented there, and a *mens rea* defense such as the one presented by Dix. Unlike the petitioners in *Davis* and *McCleskey,* it cannot be said that Dix has taken malice or intent out of issue. The insanity defense placed criminal intent at issue here; indeed, it was the primary issue at trial.

Harmless error in this case could therefore only be based on overwhelming evidence. As for the strength of the evidence here, the district court based its finding of harmless error on an evaluation of all the evidence showing that Dix was the person who killed his wife. That

evidence was indeed overwhelming. But that does not mean that the error must be found harmless, because the State presented much weaker evidence related specifically to the issues of intent and malice. The evidence specifically related to intent must be overwhelming before a *Sandstrom* error becomes harmless. *Brooks v. Francis, supra* at —; *Davis v. Kemp, supra,* at 1521. If the overwhelming evidence relates only to the identity of the killer, the jury still has to consider intent as a separate element of the offense and could rely on the faulty presumption in reaching its verdict.

The defendant and the state each produced expert witnesses to evaluate Dix's sanity. The experts made similar observations and diagnoses but reached differing conclusions regarding his criminal responsibility for the killing. Furthermore, the defendant introduced evidence of a history of possible mental illness and unstable (perhaps psychotic) behavior. The evidence establishing intent was far from overwhelming in this case, and weaker than the evidence of intent in *Brooks v. Francis, supra,* where a defendant's bare claim that a shooting was accidental undermined powerful evidence to the contrary. Since the evidence of sanity in this case was not overwhelming, the jury could have reached its verdict by relying on the illegal presumption. The *Sandstrom* error was not harmless.

The district court ruled correctly that the charge to the sentencing jury was not adequate but mistakenly found that any erroneous charge to the jury at the liability trial was harmless error. The judgment is AFFIRMED in part and REVERSED in part.

APPENDIX D

Horace William DIX, Petitioner-Appellee,
Cross-Appellant.

v.

Ralph KEMP, Warden, Georgia State Prison,
Respondent-Appellant, Cross-Appellee.

No. 84-8342.

United States Court of Appeals, Eleventh Circuit.

Oct. 28, 1986.

Susan V. Boleyn, Atlanta, Ga., for respondent-Appellant, cross-appellee.

Joseph M. Nursey, Millard C. Farmer, Atlanta, Ga., for petitioner-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and JOHNSON, Circuit Judges, and DUMBAULD*, Senior District Judge.

CORRECTED OPINION

JOHNSON, Circuit Judge.

The panel opinion in this case, published at 763 F.2d 1207 (June 5, 1985), is withdrawn and the following opinion is filed as the substituted opinion of the Court.

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Horace William Dix was convicted of murder in 1975 in the Superior Court of Clayton County, Georgia.[1] He later sought post-conviction relief on several grounds, all of which were denied by the state courts. The federal district court granted a writ of habeas corpus on the ground that the state trial court's charge to the sentencing jury did not adequately explain the nature and function of mitigating circumstances. The district court declined to grant relief on any other claim, including a claim that the trial court's instruction impermissibly shifted the burden of proof to the defendant in violaton of *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), under circumstances where this error could not be considered harmless. We hold that the district court erred in denying relief on the *Sandstrom* issue, and therefore reverse the judgment of the district court. We do not decide whether the sentencing charge did indeed fail to channel properly the discretion of the jury regarding mitigating circumstances, since a resolution of that issue is unnecessary to the disposition of this case.

The petitioner and his wife, Dixie Jordan, divorced in 1974. One month after the divorce, he came to visit at her house. The two were alone in the house when they began to quarrel. She threw an ashtray at him and he claims to remember nothing about what transpired afterwards. His wife's body, which was found in a bedroom of the house, showed that she had been tortured and stabbed to death.

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1. Dix was also tried for the subsequent kidnapping of his mother-in-law, sister-in-law and niece. Those charges are not at issue here.

The trial focused on the sanity of Dix at the time of the killing. He presented evidence tending to show that he was insane at the time of the killing, including a history of mental disability beginning with a head injury sustained while in the Navy, a pattern of bizarre behavior close to the time of the killing (including his surprise that his wife had not visited him in jail), and the testimony of a psychiatrist who had examined him, Dr. William P. Sapp. The State presented its own expert witness, Dr. Miguel Bosch, who believed that Dix suffered from a mental disorder, a depressive neurosis, which did not relieve him of criminal responsibility for the killing. The jury, after hearing the instruction on malice and intent now challenged on this appeal, returned a guilty verdict. The trial then entered its sentencing phase and the jury heard the instructions from the trial court regarding mitigating circumstances. The jury recommended the death sentence.

The petitioner takes issue with the jury charge given at the liability stage of the trial regarding malice and intent.[2] He claims that it impermissibly shifted the burden

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2. The trial court gave the following charge on the issues of malice and intent:

> The law presumes every intentional homicide to be malicious until the contrary appears from the circumstances of alleviation, justification, mitigation or excuse. . . . When and if a killing is proved to your satisfaction to be the intentional act of the defendant, himself, the presumption of innocence with which he enters upon the trial is removed from him. And the burden is upon him to justify or mitigate the homicide, unless . . . there be no evidence introduced [against him that shows] justification or mitigation. . . .

(Continued on following page)

of proof to him in contravention of *Sandstrom v. Montana, supra.* The familiar instructions used by the trial court in this case have been considered in previous cases of this Court and violate the proscriptions of *Sandstrom* in a number of ways.

These instructions establish a mandatory presumption: they go beyond simply authorizing a jury to draw inferences and state that "the law presumes." They ask the jury to presume criminal intent from the use of a deadly weapon, as in *Mason v. Balkcom,* 669 F.2d 222, 224-25 (5th Cir. Unit B 1982), *cert. denied,* 460 U.S. 1016, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983), and to presume that an intentional killing is malicious unless evidence of justification or mitigation shows otherwise, as in *Lamb v. Jernigan,* 683 F.2d 1332, 1341 (11th Cir. 1982), *cert. denied,* 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). As in *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985), the instruction states that the acts of a person of sound mind and discretion "are presumed" to be the product of the person's will. The jury was not told

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> I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will. But, this presumption may be rebutted. . . .
>
> If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. However, this presumption may be rebutted.

The charge also contained some general curative instructions: "It is for you, the Jury, to say whether the evidence in this case . . . sufficiently identif[ies] this defendant as the slayer beyond a reasonable doubt. . . . A person will not be presumed to act with criminal intention."

that they had a choice or that they *might* infer that conclusion. *Id.* 105 S.Ct. at 1972 (quoting *Sandstrom v. Montana,* 442 U.S. 510, 515, 99 S.Ct. 2450, 2455, 61 L.Ed.2d 39, 45 (1979)).

While the instructions duly note that the defendant may rebut any presumptions against him, they do not describe how he could go about making such a rebuttal. There is no mention of the quantum of evidence necessary to rebut the presumption. Because of this omission, the jury could have concluded that Dix had to produce more than "some" evidence to rebut the presumption. *Davis v. Kemp,* 752 F.2d 1515, 1518 (11th Cir.) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 2689, 86 L.Ed.2d 707 (1985). As the Supreme Court recently held in *Francis, supra,* the statement that a presumption "may be rebutted," when combined with mandatory language such as "the law presumes," could indicate to a reasonable juror that the defendant bears an affirmative burden of persuasion once the State proves the underlying act giving rise to the presumption. This ambiguity, together with the other misleading aspects of the instruction, created a real risk that the jury would shift the burden of proof to the defendant. The instruction at Dix's trial violated constitutional standards even more clearly than the instructions in *Davis.*

Since we find that the charge to the jury in this case violated the presumption of innocence, we must next address the question of whether the conviction may nonetheless stand on the grounds that the improper charge was harmless error. The Supreme Court recently held in *Rose v. Clark,* — U.S. —, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), that the harmless error standard articulated in *Chapman*

v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 705 (1967), applies to *Sandstrom* errors. The Court found that even errors shifting the burden of proof on the element of intent where intent is a critical issue in the case could be harmless if the evidence was so dispositive of the intent of the defendant that a reversing court can say beyond a reasonable doubt that the improper instruction did not affect the judgment of the jury. 106 S.Ct. at 3107-09, 92 L.Ed.2d at 472 (quoting *Chapman v. California,* 386 U.S. at 23, 87 S.Ct. at 828, 17 L.Ed. at 708).

Applying the *Chapman* doctrine to this case, pursuant to the directive in *Rose v. Clark,* this Court may uphold the conviction only if it is clear "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." 106 S.Ct. at 3109 (quoting *United States v. Hasting,* 461 U.S. 499, 510, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 96, 101 (1983)). A *Sandstrom* error on the issue of intent can be held harmless beyond a reasonable doubt under two circumstances: (1) where intent was not at issue at the trial; or (2) where evidence of guilt was "overwhelming." *Davis v. Kemp,* 752 F.2d 1515, 1521 (11th Cir.) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 2689, 86 L.Ed.2d 707 (1985). In this second situation, the court's analysis should focus on whether evidence of intent, rather than the more inclusive issue of guilt, is overwhelming. *Miller v. Norvell,* 775 F.2d 1572, 1576 (11th Cir.1985), *cert. denied,* — U.S. —, 106 S.Ct. 1995, 90 L.Ed.2d 675 (1986); *Tucker v. Kemp,* 762 F.2d 1496, 1502 (11th Cir.1985), (en banc), *cert. denied,* — U.S. —, 106 S.Ct. 3340, 92 L.Ed.2d 743 (1986).

In the instant case, the defendant presented evidence to support an insanity defense. The defendant introduced

evidence of a history of mental illness and unstable (perhaps psychotic) behavior, and testified that he could not remember what transpired after his wife threw an ashtray at him. Both the defendant and the state produced expert witnesses to evaluate Dix's sanity; these experts made similar observations and diagnoses but reached differing conclusions regarding Dix's criminal responsibility for the killing.

In *Thomas v. Kemp*, 766 F.2d 452 (11th Cir.1985), *vacated and remanded for further consideration*, — U.S. —, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), *upon remand*, 800 F.2d 1024 (11th Cir.1986) (reinstating in part original opinion at 766 F.2d 452)[3] this Court held that an instruction on the issue of intent was a *Sandstrom* violation. The victim of the crime had been savagely beaten, shot, and finally buried alive. 766 F.2d at 455. At trial, the defendant offered an insanity defense similar to the one in the instant case. He testified that he had no memory of the incident, of subsequent telephone calls to the police, or of his own confession. The defendant attributed his lack of memory to the use of drugs prior to the murder. *Id.* at 455-56.

Both in its initial opinion and on remand, the *Thomas* court unanimously concluded that the improper instruction was not harmless error. Applying the *Rose v. Clark* standard on remand, the court held that "it cannot be said beyond a reasonable doubt that the improper instruction

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3. *Thomas v. Kemp, supra,* was remanded for reconsideration in light of *Rose v. Clark, supra.* Since the *Thomas* court in effect had applied the *Chapman* harmless error standard to the error in that case, the ruling in *Rose* did not substantively affect the reasoning or result of *Thomas. See* 800 F.2d at 1026.

here had no effect on the jury verdict." At 1025. The court reasoned that since Thomas introduced evidence that he was under the influence of drugs at the time of the crime and thus incapable of forming the requisite intent, and since the erroneous instruction impermissibly shifted the burden of proof on intent to Thomas, it could not be said beyond a reasonable doubt that the instructions did not affect the jury's determination of Thomas' intent—the critical issue in the case. At 1026.

In the case of *Bowen v. Kemp,* 769 F.2d 672 (11th Cir. 1985), *cert. denied,* — U.S. —, 106 S.Ct. 3337, 92 L.Ed.2d 742 (1986), decided after the initial opinion in *Thomas* but prior to *Rose v. Clark* and *Thomas* on remand, the trial judge gave the same faulty instruction as the one given in *Thomas* and in the instant case: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but this presumption may be rebutted." This Court held that the instruction was *Sandstrom* error. As in *Thomas,* the petitioner's defense at trial was that, at the time of the crime, he was temporarily insane.

The *Bowen* Court held that the faulty instruction did not become operative unless the jury found that the petitioner was a "person of sound mind." Furthermore, the jury could not have reached this point until the jury had already rejected the petitioner's insanity defense, and "intent no longer was a viable issue in the trial." *Id.* at 677. Over a dissent, and without citing or distinguishing *Thomas,* this Court held that the *Sandstrom* error was harmless.

Faced with conflicting precedents, we follow *Thomas* and hold that, where the defendant raises an insanity defense, a *Sandstrom* error on the issue of intent cannot be harmless on the grounds that intent was not at issue. The *Bowen* decision implies that an insanity defense and a "lack of criminal intent" defense are inseparable, and that the rejection of the former implies the rejection of the latter. However, although an insanity defense consists of evidence tending to negate the existence of criminal intent, *Thomas, supra,* at 456, the two defenses are not the same. Where a defendant offers evidence tending to show he was insane, a jury might find that the defendant was sane and therefore criminally responsible for his acts, while at the same time finding that the state failed to prove that the defendant had the requisite intent for the crime charged. Based on testimony that Dix was emotionally disturbed and that his wife may have provoked him into a frenzy, a reasonable jury might have rejected the argument that Dix was insane, while still finding that the state failed to prove that Dix possessed the requisite intent for malice murder. We note that the existence of conflicting precedents on this issue may make this case ripe for reconsideration by the en banc court, which can resolve the conflict.

Having found that intent was at issue, we must next address the question of whether the evidence of intent was overwhelming. As we have previously noted, the defendant introduced evidence of a history of possible mental illness and unstable behavior, and testified that he could not remember what transpired after his wife threw an ashtray at him. The state's and the defendant's expert witnesses made similar observations and diagnoses concerning Dix's

mental health, but reached differing conclusions regarding Dix's criminal responsibility for the acts which he committed. We find that, under these circumstances, the evidence that Dix had the requisite intent for malice murder was not overwhelming. We cannot say beyond a reasonable doubt that the jury did not rely on the faulty presumption in reaching its verdict. *Davis, supra,* at 1521 n. 7. We therefore hold that the *Sandstrom* error was not harmless.

In view of the necessity to reverse the district court by reason of the *Sandstrom* error, we find it unnecessary to reach petitioner's claim that the trial judge's charge to the sentencing jury did not satisfy the requirements of the Eighth Amendment because it failed to give proper guidance regarding the nature and function of mitigating circumstances.

The judgment of the district court is REVERSED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8342

HORACE WILLIAM DIX,

Petitioner-Appellee,
Cross-Appellant,

versus

RALPH KEMP, Warden, Georgia State Prison,

Respondent-Appellant,
Cross-Appellee.

(Filed January 26, 1987)

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 28, 1986, 11th Cir., 198—, — F.2d —).

(January 26, 1987)

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCH-

ETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that the cause shall be reheard by this Court en banc *with* oral argument on a date hereafter to be fixed. The previous panel's opinion is hereby vacated.

The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8327

CHARLIE BENSON BOWEN,

Petitioner-Appellee,

versus

RALPH KEMP, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellant.

No. 84-8342

HORACE WILLIAM DIX,

Petitioner-Appellee,
Cross-Appellant,

versus

RALPH KEMP, Warden, Georgia State Prison,

Respondent-Appellant,
Cross-Appellee.

Appeals from the United States District Court
For the Northern District of Georgia

(October 22, 1987)

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCH-

ETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

VANCE, Circuit Judge:

These cases present the question whether by raising an insanity defense, a defendant places intent at issue so that under this court's decision in *Davis v. Kemp,* 752 F.2d 1515 (11th Cir.) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 2689 (1985), a *Sandstrom*[1] error cannot be harmless.

In *Bowen v. Kemp,* 769 F.2d 672 (11th Cir. 1985), a divided panel of this court reversed the district court's holding that a *Sandstrom* error was not harmless. The majority held that once the jury had rejected the defendant's insanity defense, intent was no longer at issue and that the *Sandstrom* error was harmless.[2] In *Dix v. Kemp,* 804 F.2d 618, *vacated,* 809 F.2d 1487 (11th Cir. 1986), another panel of this court reversed the district court's holding that a *Sandstrom* error was harmless. The Dix panel held that when the defendant raised an insanity defense, the *Sandstrom* error was not harmless on the ground that intent was not at issue. We accepted both cases for en banc consideration to resolve this conflict. We now follow the panel's decision in *Dix,* and hold that when a criminal defendant raises an insanity defense, a *Sandstrom* error ordinarily cannot be harmless on the grounds that intent is not at issue.

I.

To assist jurors in the difficult task of determining what a defendant intended during the commission of a crime, some courts have instructed jurors that "the law

presumes that a person intends the ordinary consequences of his acts," *see, e.g., Sandstrom,* 442 U.S. at 513, or that "acts of a person of sound mind and discretion are presumed to be the product of the person's will." *See, e.g., Francis v. Franklin,* — U.S. —, 105 S. Ct. 1965, 1969-70 (1985); *Davis,* 752 F.2d at 1517.

In *Sandstrom* and again in *Franklin,* the Supreme Court held that such instructions unconstitutionally shifted the burden of persuasion from the government to the defendant on the issue of intent.[3] *Sandstrom,* 442 U.S. at 524, *Franklin,* — U.S. —, 105 S. Ct. at 1977. The Due Process Clause of the Fourteenth Amendment protects against the conviction of an accused except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *Franklin,* — U.S. at —, 105 S. Ct. at 1970; *In re Winship,* 397 U.S. 358, 364 (1970). A *Sandstrom* error in the jury instruction thus "remove[s] from the prosecution the burden of proving every element of the crime beyond a reasonable doubt." *Davis,* 752 F.2d at 1517.

For several years, the Supreme Court declined to resolve the issue of whether a *Sandstrom* error can be harmless under *Chapman v. California,* 386 U.S. 18 (1967). *See Davis v. Kemp,* — U.S. —, 105 S. Ct. 2689, 2690-91 (1985) (White, J., dissenting from denial of certiorari); *Franklin,* — U.S. at —, 105 S. Ct. at 1977; *Sandstrom,* 442 U.S. at 526-27; *Thomas v. Kemp,* 766 F.2d 452, 455 (11th Cir. 1985), *vacated* and *remanded for further consideration,* 106 S. Ct. 3325 (1986).[4] In *Connecticut v. Johnson,* 460 U.S. 73 (1983), four justices of the Supreme Court suggested that the harmless error doctrine may never be ap-

plicable to a *Sandstrom* error. *Id.* at 85-87; *Davis,* 752 F.2d at 1520. The Court did not resolve the issue, however, until three years later.

In *Rose v. Clark,* — U.S. —, 106 S. Ct. 3101 (1986), the Supreme Court held that the harmless error standard of *Chapman,*[5] did in fact apply to jury instructions that violated *Sandstrom and Franklin.* In applying harmless error analysis to *Sandstrom* violations, this court has identified two situations where the harmless error doctrine can be invoked: (1) where the erroneous instruction was applied to an element of the crime that was not at issue in the trial, or (2) where the evidence as to defendant's guilt was overwhelming. *See Davis,* 752 F.2d at 1521.[6] *See also Miller v. Norvell,* 775 F.2d 1572, 1576 (11th Cir. 1985), *cert. denied,* 106 S. Ct. 1995 (1986); *Thomas,* 766 F.2d at 455; *Tucker v. Kemp,* 762 F.2d 1496, 1501 (11th Cir. 1985), *cert. denied,* 106 S. Ct. 3340 (1986); *Brooks v. Kemp,* 762 F.2d 1383, 1390 (11th Cir. 1985) (en banc), *vacated* and *remanded for further consideration,* 106 S. Ct. 3325 (1986).[7] The first situation arises when, for example, the only contested issue at trial is the identity of the defendant, and the *Sandstrom* error occurs in the instruction on intent. *See, e.g., Davis,* 752 F.2d at 1521. In such a case, intent is not at issue, and a *Sandstrom* error in the intent instruction may be harmless. *See id. Cf. Thomas,* 766 F.2d at 456 (where issue of intent is squarely presented to the jury, *Sandstrom* error cannot be harmless).

II.

The issue now before us concerns primarily the first type of *Sandstrom* harmless error situation; namely,

whether raising an insanity defense places intent at issue such that the harmless error doctrine cannot be invoked. It is on this narrow issue that two panels of this court reached differing results.

Defendant Bowen was convicted in Polk County, Georgia of rape and murder,[8] and sentenced to life imprisonment for rape and to death for murder. In *Bowen,* 769 F.2d 672 (11th Cir. 1985), a panel of this court reversed the district court's ruling that the *Sandstrom* error was not harmless. The *Bowen* panel agreed with defendant's claim that the Georgia trial court's jury instruction, which was virtually identical to the instruction in *Franklin,* unconstitutionally shifted the burden of proof on intent, in violation of *Sandstrom.*[9] *Id.* at 675. The *Bowen* majority, however, held that the *Sandstrom* error was harmless under *Davis,* because even though the defendant raised an insanity defense, intent was no longer at issue once the jury rejected the defense. *See id.* at 676-78.

Defendant Dix was convicted of murder in Clayton County, Georgia and was sentenced to death.[10] In *Dix,* 804 F.2d 618 (11th Cir. 1986), a panel of this court reversed the district court's denial of habeas relief. The unanimous panel found not only that the Georgia superior court's jury instruction violated *Sandstrom,* but also that the error could not be harmless error under *Rose v. Clark* and *Davis,* because by raising an insanity defense, the defendant placed intent at issue. The *Dix* panel noted that there were conflicting precedents on this issue, making en banc consideration by this court appropriate. 804 F.2d at 621.

III.

The jury instructions in both *Bowen* and *Dix* clearly violated *Sandstrom* and *Franklin,* and we agree with both panels that the instructions were unconstitutional. *See Bowen,* 769 F.2d at 675-76; *Dix,* 804 F.2d at 620. The *Bowen* panel, however, held that the *Sandstrom* error in Bowen's jury instruction was harmless error under *Davis. See Bowen,* 769 F.2d at 676-78. The *Bowen* majority reasoned that even though the defendant pleaded insanity as a defense, once the jury rejected this defense, intent was no longer at issue. *Id.* at 676-77. Therefore, the majority concluded, "it could not be gainsaid that [defendant's] acts were anything but intentional." *Id.* at 677.

The problem with this analysis is that even if the defendant fails to prove his insanity defense, intent ordinarily remains an issue at trial. Although there may be a theoretical bright line between legal insanity and legal sanity, the reality is that the line is often quite blurred. When a criminal defendant in Georgia pleads the affirmative defense of insanity he assumes the difficult burden of proving by a preponderance of the evidence either (1) that he did not have the mental capacity to distinguish between right and wrong, Ga. Code Ann. § 16-3-2 (1984), or (2) that he acted as he did because of a delusional compulsion, *Id.* § 16-3-3. *Adams v. State,* 330 S.E.2d 869, 872 (Ga. 1985). The jury's rejection of his plea does not mean it found that the defendant was totally free of mental infirmity or that his capacity to formulate a specific intent was the same as that of a normal or average person. The prosecution must still prove beyond a reasonable doubt that the defendant formed the intent necessary to convict

him of murder. As the *Dix* panel noted, "a reasonable jury might have rejected the argument that [the defendant] was insane, while still finding that the state failed to prove that [the defendant] possessed the requisite intent for malice murder." *Dix,* 804 F.2d at 622. The defendant's burden of proving insanity as a defense, does not impose the burden of proving lack of the required intent. This burden falls upon the state, and must be proved, along with all other elements of the crime charged, beyond a reasonable doubt. *Bowen,* 769 F.2d at 690 (Johnson, J., specially concurring in part and dissenting in part).[11]

The analogy to non-involvement cases is inapposite. When the only defense is that the accused was not the individual who committed the crime charged, then it can well be that intent is not at issue. In these cases, where "whoever killed the victim did so with intent and malice," *Davis,* 752 F.2d at 1521, a *Sandstrom* error on the issue of intent can be harmless. *See Tucker v. Kemp,* 762 F.2d at 1501 (defendant's sole defense was non-participation); *McCleskey v. Kemp,* 753 F.2d 877, 901-04 (11th Cir. 1985) (en banc), *aff'd on other grounds,* 107 S. Ct. 1756 (1987);[12] *Davis,* 752 F.2d at 1521. *Bowen* and *Dix* involve entirely different circumstances. Even though the juries found that the defendants failed to prove their insanity defenses by a preponderance of the evidence, the issue of intent was not conceded and the juries' findings did not relieve the state of its burden of proving the intent element of the crime.[13]

The *Sandstrom* error in in Bowen's trial, therefore, cannot be harmless on the grounds that intent was not an issue. The district court held that the *Sandstrom* error

was not harmless, but the *Bowen* panel reversed on the grounds that intent was not at issue. Because we disagree with the panel on this issue, we affirm the district court's original holding.

Focusing on the issue of intent under the *Davis* harmless error test, the *Bowen* panel majority also held that the evidence as to Bowen's guilt was overwhelming. 769 F.2d at 676. The majority correctly stated that in deciding whether the evidence was overwhelming as to defendant's guilt, the "crucial inquiry relates to whether or not there is overwhelming evidence of intent." *Davis,* 752 F.2d at 1521 n.10, citing *Connecticut v. Johnson,* 460 U.S. 73, 86 (plurality opinion), 460 U.S. at 97 n.5 (1983) (Powell, J. dissenting). *See Miller,* 775 F.2d at 1576. The panel majority, however, incorrectly applied this rule to Bowen's case.

In finding that the evidence of Bowen's intent to kill was overwhelming, the majority relied on *Davis* and the other non-involvement cases to hold that the victim's death "obviously was not the result of accident, mistake, or negligence, but rather was the result of an 'intentional' act." *Bowen,* 769 F.2d at 676. In these cases, however, intent was not a contested issue, *see Davis,* 752 F.2d at 1521, and the court could find overwhelming evidence of that intent directly from the facts surrounding the crime.

When intent is at issue, however, we cannot infer overwhelming evidence of intent directly from the physical sequence that resulted in the victim's death. We must also look at the evidence of defendant's state of mind. There was substantial evidence at trial that Bowen, though not insane, may have lacked the intent required for murder.

There was ambiguity in Bowen's conduct, and there was conflicting expert testimony on his state of mind at the time of the crime.[14] Under these circumstances, the *Sandstrom* error cannot be harmless on the overwhelming evidence ground.

The district court's holding on the *Sandstrom* issue must therefore be affirmed, with instructions to grant the writ of habeas corpus unless the state affords Bowen a new trial.

IV.

Following the Supreme Court's recent directive in *Rose v. Clark,* the *Dix* panel applied harmless error analysis to the *Sandstrom* errors. The panel held that the *Sandstrom* error at Dix's trial was not harmless, and reversed the district court. Because we hold that intent ordinarily is at issue when the defendant raises an insanity defense, and that it was in the Dix trial, we agree with the *Dix* panel that the *Sandstrom* error at Dix's trial was not harmless. The district court's denial of habeas corpus relief on the *Sandstrom* issue must therefore be reversed, and the case remanded with instructions to grant the writ of habeas corpus, unless the state afford Dix a new trial.

No. 84-8327. AFFIRMED.

No. 84-8342. REVERSED and REMANDED with instructions.

FOOTNOTES

[1] *Sandstrom v. Montana*, 442 U.S. 510 (1979).

[2] The panel affirmed the grant of a new sentencing trial because Bowen had been sentenced to death by a jury drawn from a list which unconstitutionally excluded women. In view of the result we now reach, it is not necessary that the court *en banc* consider that claim and Bowen's claim of prosecutorial misconduct. Parts III and IV of the *Bowen* panel opinion are reinstated.

[3] The Court in *Franklin* held that jury instructions that are unconstitutional under *Sandstrom* are not cured by the appendage in the instruction that the presumptions "may be rebutted." *See Franklin*, 105 S. Ct. at 1972-73. The *Franklin* court further held that earlier portions of the jury charge which instruct the jurors that the defendant is presumed innocent, and that the state is required to prove every element of the offense beyond a reasonable doubt, do not "dissipate" the *Sandstrom* error. *Id.* at 1973-74.

[4] The Supreme Court vacated and remanded *Thomas* for reconsideration in light of its recent decision in *Rose v. Clark*, 106 S. Ct. 3101 (1986). This court in *Thomas v. Kemp*, 800 F.2d 1024 (11th Cir. 1986), reviewed the record in light of *Rose* and held that the *Sandstrom* error was not harmless.

[5] The harmless error doctrine in *Chapman* requires that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. 18, 24 (1967).

[6] *Davis* was decided before the Supreme Court explicitly held in *Rose* that the *Chapman* harmless error doctrine applied to *Sandstrom* violations. However, the court in *Davis* applied harmless error analysis to the *Sandstrom* claim, under then-existing precedent. *See Davis*, 752 F.2d at 1520-21.

[7] The Supreme Court vacated and remanded *Brooks* for reconsideration in light of *Rose*. This court in *Brooks v. Kemp*, 809 F.2d 700 (11th Cir. 1986) (*en banc*), concluded that harmless error analysis conducted by the en banc court in its previous opinion followed the harmless error doctrine of *Chapman* and *Rose*. *Id.* at 700-01.

[8] For a complete discussion of the facts and the procedural history of Bowen's case, see *Bowen v. State*, 241 Ga. 492, 246 S.E.2d 322 (1978); *Bowen v. Kemp*, 769 F.2d 672, 675 (11th Cir. 1985).

[9] The instruction read:

> The acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his act but the presumption may be rebutted.

[10] For a complete discussion of the facts and the procedural history of Dix's case, see *Dix v. Kemp*, 804 F.2d 618, 619 (11th Cir. 1986).

[11] As the panel in *Dix* explained:

> The *Bowen* decision implies that an insanity defense and a "lack of criminal intent" defense are inseparable, and that the rejection of the former, implies the rejection of the latter. However, although an insanity defense consists of evidence tending to negate the existence of criminal intent, *Thomas*, 766 F.2d at 456, the two defenses are not the same. Where a defendant offers evidence tending to show he was insane, a jury might find that the defendant was sane and therefore criminally responsible for his acts, while at the same time finding that the state failed to prove that the defendant had the requisite intent for the crime charged.

Dix, 824 F.2d at 622.

[12] In holding that the defendant conceded the issue of intent by asserting an alibi defense, the en banc court in *McCleskey* added:

> In so holding, we do not imply that whenever a defendant raises a defense of alibi a *Sandstrom* violation on an intent or malice instruction is automatically rendered harmless error. Nor do we suggest that defendant must specifically argue that intent did not exist in order for the issue of intent to remain before the jury. But where the State has presented overwhelming evidence of an intentional killing

> and where the defendant raises a defense of nonparticipation in the crime rather than lack of *mens rea*, a *Sandstrom* violation on an intent instruction such as the one at issue here is harmless beyond a reasonable doubt.

753 F.2d at 904 (citations omitted). Thus even in non-involvement cases, intent may still remain at issue, and a *Sandstrom* error may not be harmless.

[13] The Bowen panel majority found support for its holding in the language of Justice Blackmun's opinion for a plurality of the Supreme Court in *Connecticut v. Johnson*, 460 U.S. 83, 87 (1983):

> In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

By holding today that a defendant ordinarily places intent at issue by pleading an insanity defense, we do not foreclose the possibility that in "rare situations," *id.*, a defendant in presenting an insanity defense may "admit that the act alleged by the prosecution was intentional." *See, e.g., Cook v. Foltz*, 814 F.2d 1109, 1113 (6th Cir. 1987). The Supreme Court explicitly left it "to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury." 460 U.S. at 87.

[14] There was testimony that Bowen was extremely depressed, could not remember whom he had attacked, and eventually turned himself in to a mental hospital. The expert testimony at trial established that Bowen was suffering from some form of mental disorder, but was inconclusive as to his state of mind at the time of the incident. There was a legitimate jury issue as to Bowen's state of mind.

RONEY, Chief Judge, concurring in part and dissenting in part:

I agree that an insanity defense does not subsume the proof of intent required to convict of a capital offense. Neither does the assertion of an insanity defense, lost before the jury, mean that a habeas corpus court should not deny relief on a *Sandstrom* error when that error is harmless because of overwhelming evidence as to intent. *See Rose v. Clark,* — U.S. —, 106 S. Ct. 3101 (1986).

Applying these principles, I concur in the result reached by the court in Dix. I dissent from the result reached in Bowen on this issue, on the ground that any *Sandstrom* error was harmless beyond a reasonable doubt.

I concur in both Judge Fay's opinion and Judge Edmondson's opinion, except as to the conclusion in Dix.

HILL, Circuit Judge, dissenting:

The majority's holding in these two cases leads us farther down a path I find most unattractive. We are at or near the point where The Great Writ automatically issues any time a trial judge is found to have instructed a jury that intention can be presumed from a person's acts. I respectfully dissent.

As the majority opinion relates on page 3, *Sandstrom/Franklin* violation instructions have, over the years, taken

two forms. One, condemned in *Sandstrom* commences, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 513. The other, found in *Franklin,* includes "acts of a person of sound mind and discretion are presumed to be the product of the person's will." — U.S. at —, 105 S. Ct. at 1970.

Both versions are incorrect abstract statements of the law. The *Sandstrom* version results in a shift of the burden as to any person who is a defendant. The *Franklin* version, however, applies only to defendants who are of sound mind and discretion.

"Sound mind" is defined as "[t]he normal condition of the human mind,—that state in which its faculties of perception and judgment are ordinarily well-developed, and not impaired by mania, insanity, or other mental disorder." Black's Law Dictionary at 1251 (5th ed. 1979). I do not believe that a person could, at once, be of sound mind and yet be suffering from such a mental defect or deficiency that he could not form intent to commit murder.

In these (*Bowen/Dix*) cases the *Sandstrom* instruction was not given. In both cases, the *Franklin*—". . . person of sound mind and discretion . . ." version was given.

My review of the record in *Sandstrom,* as it existed before the United States Supreme Court, discloses that the trial judge's instruction that "[t]he law presumes

that a person intends the ordinary consequences of his voluntary acts," 442 U.S. at 513, was the only statement by the trial judge on this subject. The holding in *Sandstrom* has made its way through cases involving instructions incorporating the presumption but far more circumscribed than the instruction given in *Sandstrom; Franklin* is a good example of this expansion. Until today, though I know of no holding that the mere incantation of the presumption, directed toward a particular defendant, would spoil a conviction of one to whom it specifically does not apply.

In *Bowen* and *Dix*, there was a question of mental soundness of each defendant. The trial judge in each case, apparently aware of and sensitive to this issue, limited the instruction so that the jury could apply it only if it first found each defendant to be "of sound mind." The instruction in each case was as follows:

> The acts of a person *of sound mind and discretion* are presumed to be the product of the person's will but the presumption may be rebutted. A person *of sound mind and discretion* is presumed to intend the natural and probable consequences of his act but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the tryor [sic] of facts, that is you the jury, may find such intention upon the consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.

Bowen, 769 F.2d at 675 (emphasis supplied).

"I charge you that the acts of a person *of sound mind and discretion* are presumed to be the product of a person's will. But, this presumption may be rebutted . . . ." "A per-

son will not be presumed to act with criminal intention." *Dix,* 804 F.2d at 619-20 n.1 (emphasis supplied).

Had either of the two defendants been found not to be of sound mind, that defendant's trial would not be in any sense affected by the presumption of intent. Thus, in the event of a finding of unsound mind, no constitutional error appears.

On the other hand, in each case, if the defendant were found to be of sound mind, the instruction condemned in *Sandstrom* and *Franklin* would apply and our only task would be to ascertain whether, under *Rose v. Clark,* — U.S. —, 106 S. Ct. 3101 (1986), the instruction was harmless error. In my view, in each of these cases, the evidence is overwhelming that a person of sound mind committing these crimes did so intentionally. The finding of intent would not have been influenced by the incorrectness of the instruction. Therefore, as applied to persons of sound mind, the instruction was harmless.

In sum, there was no erroneous instruction given to be applied by the jury to one unsound mind, and the instruction was harmless insofar as it applied to one of sound mind. There is no reason for the grant of the writ of habeas corpus to undercut the conviction and sentence of either of these appellants.

FAY, Circuit Judge, dissenting in part and concurring in part, in which EDMONDSON, Circuit Judge, joins; RONEY, Chief Judge, joining in part:

Most respectfully, I dissent from portions of the majority opinion while agreeing with others. It seems to me

that it is rather important to note at the outset what the majority does not hold. The majority opinion does not adopt the *per se* rule announced by the panel opinion in *Dix* that "where the defendant raises an insanity defense, a *Sandstrom* error on this issue of intent cannot be harmon the grounds that intent was not at issue." 804 F.2d at 621, *vacated;* 809 F.2d 1487 (11th Cir. 1986). Rather, the majority holds that, "when a criminal defendant raises an insanity defense, a *Sandstrom* error *ordinarily* cannot be harmless on the grounds that intent is not at issue." (emphasis added) I agree. This language is supplemented by footnote 13 which points out that there may be "rare situations" when a defendant would raise an insanity defense but nevertheless "admit that the act alleged by the prosecution was intentional." I agree.

Because I cannot imagine a better illustration of just such a case than *Bowen v. Kemp,* I dissent from the granting of relief based upon the *Sandstrom* error. Charles Bowen confessed to stabbing his twelve year old female victim in the back as she was trying to run away after he had raped her. When she turned around he stabbed her in the chest. Bowen stated that the victim told him to go ahead and finish her off. Thereafter he stabbed her repeatedly twelve or fourteen times! Hardly unintentional acts.

Defense counsel decided that the only course to pursue was insanity. Although not successful, it appears to have been a very sound and reasonable decision. That's all the *Bowen* trial was about. Experts testified and the jury concluded that Bowen did have the mental capacity to distinguish between right and wrong and that he was not

acting under any delusional compulsion. The jury found him sane and sentenced accordingly. In my opinion this case is the "rare situation" described in footnote 13. The defense in *Bowen* conceded that the act of killing was intentional. There was no issue in that regard for the jury to resolve.

Two other aspects of the majority opinion require comment.

In Section III it is stated that, "The jury's rejection of his plea does not mean it found that the defendant was totally free of mental infirmity or that his capacity to formulate a specific intent was the same as that of a *normal* or *average* person." (emphasis added). Although it seems to me that the use of the words "normal" and "average" might create serious confusion, understanding of the thought being expressed is important. There is no legal requirement that a defendant be found to be normal or average before he or she can be found guilty of murder. The only requirement is that the defendant possessed the necessary criminal intent. Certainly such could be found to exist in persons considered abnormal or found to be below average in intelligence. The majority opinion does not hold otherwise.

Also in Section III of the majority opinion we find the statement, "When intent is at issue, however, we cannot infer overwhelming evidence of intent directly from the physical sequence that resulted in the victim's death." Although startling as an independent proposition, I do not read this as abolishing the ageless truism that "actions speak louder than words." Certainly courts must consider all of the evidence presented in each case but I know of

nothing more probative, in any trial, than evidence relating to the conduct of the parties. To suggest that there is "ambiguity in Bowen's conduct" is simply contrary to this record as I read it. A man, found to be sane, stabbed a twelve year old female fourteen times through her back, chest and neck. Reasonable persons could certainly conclude that such action was intended to result in death. The jury's verdict in this regard should be upheld. Although agreeing with much of the majority opinion, as I understand it, I would conclude that the *Sandstrom* errors in both the Bowen and Dix trials were harmless beyond reasonable doubt.

EDMONDSON, Circuit Judge, concurring in part and dissenting in part, in which HILL and FAY, Circuit Judges, join; RONEY, Chief Judge, joining in part:

I agree that just by asserting the defense of insanity, a defendant in a murder case does not automatically concede intent to kill. The question of intent remains in issue, and the State has the burden to prove intent. A *Sandstrom* error may still be harmless, however. I dissent from today's court's opinion in both *Dix* and *Bowen* because the evidence of intent is overwhelming. *See generally Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986) (although defendant claimed he was either insane or incapable of forming the requisite criminal intent, *Sandstrom* error still could be harmless).

In these cases, the juries rejected the insanity defense. I think no rational jury would conclude that a sane person who did the evil things that Dix (torture and repeated stabbings) and Bowen (rape and repeated stabbings) did to their victims lacked the intent to kill. "[I]t would defy

common sense to conclude that an execution-style killing or a violent torture-murder was unintentional." *Rose*, 106 S.Ct. at 3108 n.10. Whatever errors were in the jury instructions concerning intent in the *Dix* and *Bowen* trials were harmless beyond a reasonable doubt.